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ILLINOIS CONSTITUTION

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IN THE

Supreme Court of the United States

October Term, 1927

No. 11. ORIGINAL

State of Wisconsin, State of Minnesota, State of Ohio, and State of Pennsylvania, Complainants, vs. State of Illinois and Sanitary District of Chicago, Defendants. State of Missouri, State of Kentucky, State of Tennessee, State of Louisiana, State of Mississippi, and State of Arkansas, Intervening Defendants.	No. 7, Original.
State of Michigan, Complainant, vs. State of Illinois and Sanitary District of Chicago, Defendants.	No. 11, Original.
State of New York, Complainant, vs. State of Illinois and Sanitary District of Chicago, Defendants.	No. 12, Original.

BRIEF FOR STATE OF MICHIGAN

IN SUPPORT OF EXCEPTIONS TO REPORT OF SPECIAL MASTER

REFERENCE TO REPORT OF SPECIAL MASTER

This case is an original action brought under the equity jurisdiction of the Supreme Court of the United States, and therefore reference cannot be made to any opinion from a lower court. Reference, however, is respectfully made to the Report of the Special Master to whom this case was referred. This Report was filed November 23, 1927, with the Clerk of this Court, and reference is made thereto for the findings of fact and conclusions of law referred to.

JURISDICTION OF THIS COURT

Inasmuch as the Special Master has found (Report of Special Master, pages 140-146) that this Court has jurisdiction in the instant case, and has held that this action presents a justiciable controversy (to which Defendants have not excepted), it is deemed unnecessary to set forth at greater length than by citation the authorities relied upon to sustain the jurisdiction of this court and that a justiciable controversy is presented.

Cohens v. Virginia, 6 Wheat. 263;
Missouri v. Illinois, 180 U. S. 208, also 200 U. S. 496;

Louisiana v. Texas, 176 U. S. 1;
Hans v. Louisiana, 134 U. S. 1;
Kansas v. Colorado, 185 U. S. 125;
New York v. New Jersey, 256 U. S. 296;
Wyoming v. Colorado, 259 U. S. 419;
North Dakota v. Minnesota, 263 U. S. 365;
Pennsylvania v. W. Virginia, 262 U. S. 553;
Georgia v. Tennessee Copper Co., 206 U. S. 237.

EXCEPTIONS TO REPORT OF SPECIAL MASTER RELIED ON

Statement of errors assigned is also dispensed with herein because the case was not heard in a lower court. However, attention is called to the "Exceptions to the Report of the Special Master" filed by Complainant, January 3, 1928, with the Clerk of this Court, in No. 11, Original, October Term, 1927, which exceptions are now severally relied upon and urged.

STATEMENT OF THE PLEADINGS

(It is deemed necessary to set forth a summary of the pleadings and statement of facts, so that Complainant's position may be made clear.)

This is an action brought under the original equity jurisdiction of the Supreme Court of the United States by the State of Michigan, complainant, to enjoin the State of Illinois and the Sanitary District of Chicago, defendants, from abstracting the waters of Lake Michigan, to the damage of complainant. The Bill was filed in this Court by the State of Michigan, complainant, on March 8, 1926, alleging that the diversion at Chicago had caused a lowering of the levels of Lakes Michigan, Huron, St. Clair, Erie and Ontario, and of the waterways connecting these lakes, and of the St. Lawrence River above tidewater, not less than six inches below the levels that would otherwise exist, to the serious injury of complainant, as a sovereign state, as *parens patriae*, and as proprietary owner of land littoral to the Great Lakes and their connecting waters; that the acts of defendants in abstracting and diverting water from Lake Michigan had never been authorized by complainant or by Congress, and were in violation of the legal rights of complainant and her people, to the free and unobstructed use of Lake Michigan and the other Great Lakes, connecting waterways, and the ports and harbors thereof, within the borders of the State of Michigan, for the purposes of navigation, trade, and commerce, free from any interference with the navigable capacity of such waters, by any agency of complainant, or the United States Government, and also, the right to the free and unobstructed navigation of Lakes Michigan, Huron, St. Clair, Erie and Ontario, and the navigable waters between these

lakes, and from them into the Mississippi River and the Atlantic Ocean, both under the common law and the Ordinance of 1787 for the Government of the Northwest Territory; also that the acts of defendants were in violation of the provisions of the Act of Congress of March 3, 1899, and particularly of section 10 of that act; and also, that the defendant Sanitary District of Chicago had not complied with the conditions of the permit of the Secretary of War of March 3, 1925.

The defendants filed their Answer June 1, 1926, setting forth their claims as to the nature and history of the sanitary canal and the diversion of water from Lake Michigan, and its claimed purposes, and asserted authority for the diversion, under acts of the legislature of Illinois and of Congress and permits of the Secretary of War, claimed to be authorized by Congress in the regulation of interstate commerce; also alleging full compliance with the conditions of the permit of the Secretary of War of March 3, 1925.

The defendant, Sanitary District of Chicago, also alleged that Lakes Michigan, Huron, St. Clair, Erie and Ontario, and the connecting waterways, were not lowered more than four and three-fourths inches, by reason of the Chicago diversion, while the defendant State of Illinois claimed that the mean level of the Lakes and connecting waterways were not lowered to any greater extent than that which would exist in the absence of the Chicago diversion. Other defenses were set forth by the defendants, but disposed of by the Special Master and do not need consideration.

On June 7, 1926, by order of reference, the cause was referred by this Court to the Special Master, and the State of Michigan, complainant, was permitted, upon its election (which was exercised) to participate in the taking of testimony and in the hearing before the Special

Master, in like manner and with like effect as if the action had been consolidated by the Court's order with similar actions begun by the States of Wisconsin, Minnesota, Ohio, Pennsylvania, and New York, complainants, against these same defendants, and in which actions the States of Missouri, Tennessee, Kentucky, Arkansas, Mississippi and Louisiana appeared as Intervening Defendants.

The Special Master filed his Report herein on November 23, 1927, and on January 3, 1928, this complainant, the State of Michigan, filed its Exceptions to the Report of the Special Master.

STATEMENT OF FACTS

1. THE GREAT LAKES-ST. LAWRENCE WATERWAY.

The Great Lakes-St. Lawrence Waterway is a great natural system of navigation and highway of commerce, consisting of Lakes Superior, Michigan, Huron, St. Clair, Erie and Ontario, and the St. Marys, St. Clair, Detroit, Niagara and St. Lawrence Rivers. (M. R. 107.) This system of waterways was navigable in a state of nature and its navigable capacity has been improved by agencies of the local, State, Federal and Canadian Governments. (M. R. 107, 49.) It has a shore line from the west end of Lake Superior to the international boundary line on the St. Lawrence River of 8,117 miles, of which 4,345 miles are within the United States. (M. R. 107.) Of this shore line, 2,391 miles lie within the State of Michigan, 55 miles within the State of Pennsylvania,

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(For convenience the abbreviation M. R. will be used for page citations from the Master's Report.)

719 miles within the State of New York, 673 miles within the State of Wisconsin, 186 miles within the State of Minnesota, 261 miles within the State of Ohio, and only 60 miles within the defendant state of Illinois.

The total drainage area of the Great Lakes-St. Lawrence in land and water surface is 298,080 square miles. The total land area of the Great Lakes-St. Lawrence system drainage basin is 202,910 square miles, of which only 715 square miles lie within the defendant State of Illinois, while there are 95,170 square miles of water surface area in this system, of which only 1,674 square miles are within the State of Illinois. (M. R. 107.) In a state of nature the mean annual contribution of the State of Illinois to the net water supply of this waterway was 503 c.f.s.*, (M. R. 23), and the Chicago River flowed into Lake Michigan and contributed to the water supply of the Great Lakes-St. Lawrence as would also the Little and Grand Calumet Rivers. (M. R. 10, 23.) Under natural conditions all of the waters of the Great Lakes-St. Lawrence system discharged eastward through the St. Lawrence River into the Atlantic Ocean. (M. R. 10, 107.)

2. COMMERCE, NAVIGATION, AND OTHER INTERESTS OF MICHIGAN AND HER PEOPLE IN THE GREAT LAKES-ST. LAWRENCE WATERWAY.

Around the Great Lakes there has been built up in the State of Michigan, as well as other states, a great industrial and commercial civilization, involving investments of hundreds of millions of dollars, and the employment of millions of people. This came about largely because

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*(For convenience the abbreviation c.f.s. will be used for cubic feet per second.)

navigation of a practical nature could be carried on with vessels of a sufficiently deep draft to make water transportation economical. Millions of people have settled on the Great Lakes and commerce and industry are dependent for their prosperity and future development upon the availability of this great waterway to the limit of its natural capacity, and particularly is this true of the State of Michigan which is nearly surrounded by this waterway system. (M. R. 106-118.)

The Great Lakes and their connecting channels form a natural highway for water transportation of over 95,000 square miles, extending from Duluth on Lake Superior, to Montreal on the St. Lawrence. (M. R. 107.) There are approximately 400 harbors on the Great Lakes and connecting channels, of which about 100 have been improved by the Federal Government at enormous public expense, (M. R. 49, 107), such improvements mainly consisting in excavations and maintenance of channels from deep water to harbor entrances. In many cases local harbors, located inside of the Federal channels, have been improved and maintained at local expense, these harbors being necessary for practical navigation. Loading, unloading and other terminal facilities have been constructed in these ports on a large scale and at great local expense. The State of Michigan has a large number of these improved ports and inner harbors. (M. R. 107.)

There are about 300 unimproved harbors which have navigable capacity, which are used by pleasure and fishing boats and small craft in the landings, bays, inlets and river mouths, a large number of which are within the State of Michigan. (M. R. 107.)

Transportation on the Great Lakes by American ports during the year 1923, amounted to 125,517,551 tons, valued at $1,383,903,309. Among the ports engaged in

handling this business were a large number of the ports of the State of Michigan. (M. R. 108.)

The territory which is tributary to the Great Lakes is the most important grain producing district in the world, and includes not only American grain, but nearly all of the Canadian grain. During the ten year period ending with 1923, the states in this territory produced 71.8 per cent of the wheat, 87.7 per cent of the oats, 66.8 per cent of the corn, 73.1 per cent of the barley, and 82.3 per cent of the rye of the United States. An enormous volume of grain is shipped eastward over the Great Lakes to domestic and foreign ports. Over 350,000,000 bushels arrived at four Great Lakes ports in 1923, from western and northwestern states. A large amount of Canadian grain is also shipped through American ports. Over 409,849,000 bushels of grain were shipped on the Great Lakes during 1923 alone. (M. R. 108-9.)

Another important commodity shipped on the Great Lakes is iron and copper ore; nearly half of the total lake traffic in 1923 consisting of ore shipments. During that year six iron ore ranges in the Lake Superior region shipped 80 per cent of the total ore moving from American mines. This ore was shipped from five ports, two of which are located in the upper peninsula of the State of Michigan. The bulk of this ore was received at fourteen ports on Lake Michigan and Lake Erie, and smaller amounts at other ports. In 1923 the port of Duluth shipped nearly 38,000,000 long tons of ore alone, and the ports of Michigan rank high in the quantity of iron ore transported on the Great Lakes. (M. R. 109.)

Large quantities of coal are shipped upon the Great Lakes from Ohio, Pennsylvania, Virginia, West Virginia, Tennessee and Kentucky, to markets in the northwestern states and the provinces of Canada. This shipment of coal from mines to ports of loading on Lake

Erie and Lake Ontario, during 1923, amounted to 34,293,373 tons, consisting of both bituminous and anthracite coal. Of this coal shipped from lower Lake ports, a vast quantity was shipped to ports upon all of the lakes and connecting waters, including those of the State of Michigan. Large amounts of coal shipped by lake transportation were consumed at upper lake ports, including those of the State of Michigan. This movement of coal amounted to about 8,621,337 tons in 1923. (M. R. 110.)

In addition to iron ore, grain and coal which are the bulk commodities of importance carried on the Great Lakes, other commodities including stone, sand, gravel, lumber and petroleum are most important in the amount of tonnage, and comprised about 12 per cent of the lake traffic in 1923. With the exception of about 700,000 tons, the stone shipped on the Great Lakes in 1923, originated in the State of Michigan, three ports alone shipping 9,021,000 tons of stone. (M. R. 111.)

The traffic in forest products, on the Great Lakes in 1923, amounted to 378,674 tons. Petroleum products moving on the Great Lakes to various ports, including Detroit and other Michigan ports, where they are stored in tanks for local distribution, amounted in 1923 to 1,577,518 tons. The movements of sand and gravel, being of a local nature and the hauls being generally short, are not all recorded, but in 1923 the receipts by American ports on the Great Lakes amounted to 3,771,160 tons. Package freight moved on the Great Lakes in 1923 amounted to 3,000,000 tons. The car ferry traffic of the Great Lakes has grown to such proportions that special types of carriers have been developed. This particular transportation depends largely upon improvements at lake harbors permitting car ferries to make rail-to-ferry connections. (M. R. 112.)

During the year 1923 alone, the Great Lakes commerce constituted 44 per cent of the total water-borne commerce of the United States, there being 71,466,902,000 ton-miles of water-haul of the principal bulk commodities of water-borne traffic on the Great Lakes. (M. R. 112.) All of this commerce is directly dependent to a large degree, upon the water levels of this waterway system for its continuance. (M. R. 113.)

The United States Shipping Board, in a statement issued November 29, 1926, summarized its view of the magnitude of water-borne traffic on the Great Lakes and its appraisal in comparison with ocean commerce, illustrating the enormous trade that is handled on the Great Lakes. It was said: (J. R. 185, 186)*

> "The magnitude of water-borne traffic on the Great Lakes is shown in statements prepared by the Bureau of Research, United States Shipping Board, in cooperation with the Board of Engineers for Rivers and Harbors, War Department, indicating that more than 210,300,000 cargo tons of freight were handled through Great Lakes ports in 1925, an increase of 31,000,000 tons, 11.8% over the total of the preceding year. Nearly 44% of the total water-borne commerce of the United States was conducted on the waters of the Great Lakes. The 197,500,000 tons of coastwise trade of ocean ports by more than 30,000,000 cargo tons, and the 12,000,000 tons of foreign commerce passing through Great Lakes ports constituted 13.8% of the total foreign commerce of the United States in 1925.
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> "In the relative standing of all United States ports by volume of cargo tonnage handled, Duluth-Superior, with a total of 45,600,000 tons, ranks second to New York. Fifteen other Great Lakes ports handled more than 5,000,000 tons of freight each. The total cargo tonnage passing through these sixteen ports exceeded 172,900,000 tons and included 82.4% of the

*(For convenience the abbreviation J. R. will be used for page citations from the Joint Abstract of Record.)

coastwise traffic as well as 78.3% of the United States foreign trade conducted on the Great Lakes in 1925."

In addition to its ports and harbors, and this commerce, the State of Michigan has a shore line of 2,391 miles including a large number of islands, on Lakes Superior, Michigan, Huron, St. Clair and Erie, and their connecting waters, which is the site of a great summer resort industry, and the location of thousands of summer homes and cottages of the people of the State. (M. R. 105, 117.) Small towns have been built up, devoted to and dependent upon the summer resort industry for their existence. There are excellent bathing beaches, fishing and hunting grounds, including marshes and attractive features for birds and other wild-life, all peculiarly suited to navigation of small craft. Likewise the State of Michigan has 26 public parks located on the shores of the Great Lakes with 21 miles of shore line for the pleasure and recreation of its people; also the State of Michigan has built docks at Mackinaw City and St. Ignace and has established a ferry service across the Straits of Mackinac as a part of its highway system. All of these major interests of complainant and its people are dependent to a great degree upon the levels of the Great Lakes-St. Lawrence system. (M. R. 105, 117.)

3. THE CHICAGO SANITARY CANAL.

The drainage basins of the Great Lakes-St. Lawrence and the Mississippi River system are separated by a continental divide which passes about ten miles to the west of the southwestern end of Lake Michigan, and in its natural state was from ten to eleven feet above the level of Lake Michigan. (M. R. 10.) Between this divide and the Lake lies the basin of the Chicago River, with its two

branches, both near the shore of the Lake, the North Branch flowing in a southerly direction, and the South Branch flowing northerly. (M. R. 10.) These branches unite about one mile from the Lake to form the main channel of the River, which formerly flowed into Lake Michigan, carrying with it the waters of its drainage basin. (M. R. 10.) The Little and Grand Calumet Rivers, rising in Indiana, flowing westerly into Illinois, curve to the north and east, and in their natural condition flowed into Lake Michigan, carrying the waters of their drainage basins. (M. R. 10, 11.)

The city of Chicago lies on a low prairie between Lake Michigan and the Des Plaines River, which river is on the other side of the continental divide. This river rises in southern Wisconsin, flows southerly, parallel to the lake shore, until it reaches a point about due west of the mouth of the Chicago river, and then turns southwest, joining the waters of the Kankakee River to form the Illinois River, which flows into the Mississippi. (M. R. 10, 11.) Between the Des Plaines and South Branch of the Chicago River there was a swampy tract, known as Mud Lake, through which in times of freshet, the waters of the Des Plaines River poured over the divide into the Chicago basin and found their way into Lake Michigan. (M. R. 10-11.)

By Act of March 30, 1822, Congress authorized Illinois to survey and mark through public lands of the United States the route of a canal connecting the Illinois River with Lake Michigan, and by Act of March 2, 1827, to proceed with the construction of that canal which was begun in 1836 and completed in 1848. (M. R. 11.) That canal crossed the continental divide between the Chicago and Des Plaines Rivers on a summit level eight feet above the lake, paralleled the Des Plaines and Upper Illinois Rivers to La Salle, Illinois, where it entered the Illinois

River. The summit of the canal was supplied with water by pumping out of the Chicago river—only enough water being pumped originally to meet the needs of navigation —a depth of four feet. (M. R. 11, 12.) The Chicago River has always been the main receptacle of the sewage of the City of Chicago. (M. R. 12.) It was found that pumping to supply the Illinois-Michigan canal perceptibly cleaned the waters of the South Branch of the Chicago River. (M. R. 12.) In 1865 the Legislature of Illinois, recognizing that the Chicago River was sluggish and that steps should be taken to purify the river from the sewage of the rapidly growing city of Chicago, together with the waste of industrial plants which had become very offensive, authorized a deeper canal and an arrangement was made to deepen that canal and introduce water by gravity flow through the Chicago River from the lake into the canal, so as to accomplish that purpose. (M. R. 12.) After considerable effort with only a fair degree of success, and after trying several expedients to afford sufficient dilution to flush the sewage down that canal, it was recognized that some other expedient must be resorted to. (M. R. 13.) The reversal of the rivers was not accomplished and the mean flow was less than 300 c. f. s. (M. R. 13.) In 1881 the Legislature of Illinois adopted a resolution reciting the gross pollution of the Illinois River by the sewage of Chicago and the consequent injuries to fish life and the inhabitants of the Illinois Valley and requiring the City of Chicago to pump not less than 1000 c. f. s. of water from the Chicago River into the canal for the purpose of relieving the pollution of the Illinois River, and further reserving the right to require the City of Chicago in future years, to take care of its sewage through other channels. (M. R. 13.) But this was not effective, and in 1886, after numerous complaints, a Drainage and Water Supply Commission was

created to study and report upon the question of this disposal of the sewage. (M. R. 14.) This Commission considered three methods of sewage disposal and recommended as most economical the discharge into the Des Plaines River through an artificial channel to be cut across the continental divide, thus providing a canal that would furnish ample dilution. (M. R. 14.)

Accordingly, the Legislature of Illinois, by Act of May 29, 1889, authorized the creation of Sanitary Districts to provide for drainage, with power to condemn property to construct channels for a sanitary canal, and other powers, requiring that any channel constructed be of sufficient capacity to produce a continuous flow of water of at least 200 cubic feet per minute for each one thousand population, which was later amended so as to provide a channel which should discharge not less than 20,000 cubic feet per minute for each one hundred thousand inhabitants, "and shall thereafter maintain the flow of such quantity of water." (M. R. 14-17.)

Under this Act of 1889, the Sanitary District of Chicago was organized in 1890, its district comprising an area of 185 square miles, and by later acts approximately 438 square miles, extending from the Illinois state line on the south and east to the northern border of Cook County on the north, with about 34 miles of frontage on Lake Michigan, and embracing the so-called metropolitan area of Chicago, made up of 54 suburbs including cities, towns and villages. (M. R. 17, 18.)

In 1892 the Sanitary District of Chicago began construction of the Sanitary Canal, an artificial channel extending from the west fork of the South Branch of the Chicago River, near Robey Street (in the City of Chicago and about six miles from Lake Michigan) to the Des Plaines River at Lockport, a distance of about 28 miles. It was dug thirteen miles through earth to Willow Springs

24.4 feet deep and from 250 to 300 feet wide. It was blasted out of solid rock from Willow Springs to Lockport, with a width of 161 feet and a depth of 24.4 feet. Controlling works were constructed at Lockport, with seven sluice gates each 30 feet wide and a movable dam 160 feet long. By the opening of these gates or the lowering of the dam the amount of water flowing in the main channel could be regulated at all times. (M. R. 18.) On June 16, 1896, work on the channel of the Sanitary Canal proceeded to the point where the Sanitary District asked authority to widen and deepen the Chicago River. The United States District Engineer recommended the granting of the permit upon condition that it should not be interpreted as approval of the plans of the Sanitary District to introduce a current into the Chicago River and upon the ground that an abstraction of water from the lakes was not involved in the application then under consideration. (M. R. 34, 35.) These conditions were included in the permit of the Secretary of War, July 3, 1896. Later the Sanitary District made application to open the main channel of the Sanitary Canal to reverse the flow of the Chicago River and cause it to flow away from Lake Michigan to the west. On April 24, 1899, the United States District Engineer at Chicago, in reporting on the proposal, deplored the situation that had been created by the Sanitary District going ahead with large expenditures without any assurance that authority would be granted, and recommended that a conditional permit be granted awaiting the action of Congress providing an obstructive current was not introduced into the Chicago River, and the Secretary of War issued a permit with such conditions May 8, 1899, stating emphatically that this permit was but temporary and that the final action of Congress would control. (M. R. 38.)

The canal was opened January 17, 1900. (M. R. 18.) Since that date the flow of the Chicago River has been reversed and instead of flowing into Lake Michigan with the waters of its drainage basin, it has been made to flow away from Lake Michigan into the Sanitary Canal and from thence into the Mississippi River system, not only diverting its own drainage contribution but carrying along with it the abstraction from Lake Michigan. (M. R. 19.)

On April 9, 1901, the Secretary of War directed the Sanitary District to regulate the discharge through the Chicago River into the drainage canal, so that the maximum flow should not exceed 200,000 cubic feet per minute. (M. R. 41.) On July 15, 1901, the Sanitary District made application for permission to flow 300,000 cubic feet per minute between four p. m. and twelve o'clock at midnight, for the purpose of sewage disposal, on the ground that such an increased flow during the period in question would not injure navigation, as the effect upon the current would be confined to the period extending from twelve o'clock at midnight to six a. m. on the following day. (M. R. 42.) On October 16, 1901, the Sanitary District applied for permission to flow 300,000 cubic feet per minute, but limited the request to authorization of 250,000 cubic feet per minute, until the close of navigation, so as not to injure navigation interests, and on December 5, 1901, a formal permit was issued regulating the flow to 250,000 cubic feet per minute. (M. R. 42.) Just prior to January 17, 1903, the Sanitary District applied to the Secretary of War for permission to increase the discharge through the Chicago River and drainage canal to 350,000 cubic feet per minute during the closed season of navigation, in the interests of the health of the people of Chicago, on the ground that navigation would not be injured by such a flow because of the closed season. (M. R. 43.) The Dis-

trict Engineer recommended the grant of the application during the closed season of navigation until March 31, when it was to be reduced to 250,000 cubic feet per minute again, whereupon the Secretary of War's permit of January 17, 1903, contained these terms. (M. R. 43.)

This canal as originally constructed and opened ended in a non-navigable tail-race. (M. R. 19.) There was no lock at the southwestern end, but authority was given by Illinois Act of May 14, 1903, extending the corporate limits of the Sanitary District of Chicago so as to permit it to construct a channel across the Illinois and Michigan canal, and to construct dams, waterwheels and other works to develop water power from the water passing through its main and auxiliary channels. (M. R. 19.) This work was accomplished and the main channel was extended to the proposed power house ready for operation in 1907. (M. R. 19.) In 1908 by constitutional amendment of Illinois, authority was provided to construct the canal from Lockport to Utica, and for the installation of power plants and necessary appliances to develop water power under regulations to be authorized by the Legislature of Illinois. (M. R. 19, 20.) Water power has accordingly been developed from 1908 to the present. Since 1908 hydro-electric power has been generated by the Sanitary District at the easterly terminus of the main channel, although the actual output at the power house has been much less than the theoretical capacity, due to the present inefficiency of the installation. The total quantity of electrical power which has been generated by the Sanitary District at Lockport since 1907 is 1,957,509,931 K.W.H.* or 299,408 horse power. (M. R. 24-26.) During the period 1920 to 1924 the average yearly production of power was 122,343,360 K. W., or

*(For convenience the abbreviation K.W.H. is used for Kilowatt-Hours.)

about 18,721 horse power. A large amount of power thus generated has been used in the work of the Sanitary District and also for street and park lighting in the city of Chicago and other municipalities within the District. A considerable portion of the power developed has been sold to commercial consumers at a price of about $55.00 per horse power, thus giving an asset worth at least $1,029,655.00 per year. (M. R. 24-26.)

November 28, 1906, the Sanitary District submitted a proposed permit to the Secretary of War to authorize the construction of a channel from the Calumet River through a depression known as the "Sag", to connect with the main drainage canal for the purpose of diverting the water of the Little Calumet River, and reversing its flow, under ordinary conditions, for sanitary purposes. Both the Chief of Engineers and the Secretary of War rejected this request March 14, 1907, (M. R. 48, 49) but a permit was granted for the construction of the so-called North Shore Canal from Lake Michigan at Wilmette to the North Branch of the Chicago River, September 11, 1907, providing that no greater amount was diverted from Lake Michigan. (M. R. 51.) The Sanitary District, however, ignoring the Federal Government entirely, proceeded with the construction of the Calumet-Sag channel, and the United States Government brought an action in 1908 in the Federal Circuit Court for the Northern District of Illinois, Eastern Division, to prevent the construction of a canal whereby further diversion could be brought about. (M. R. 52.) This suit, after considerable delay, (from 1908 to 1913), was joined with another suit brought by the Federal Government in 1913 to restrain diversion of water from Lake Michigan above the maximum permitted by the Secretary of War. (M. R. 72.) This suit finally reached this Court in June, 1923, and was terminated January 5th, 1925, in a decree upholding the

Government's contention, but in the meantime the Sanitary District had proceeded with the construction of the Calumet-Sag channel and from that time on diverted its water into the channel of the Sanitary Canal without any new permit, and in the meantime had been exceeding its permit by double the amount mentioned in the only permit under which it could claim. (R. 22, 23, 59, 72.)

January 10, 1910, the Sanitary District formally applied for permission to construct a channel from the Little Calumet River to the main channel of the Sanitary Canal. (M. R. 59.) On March 1, 1910, the Chief of Engineers reported to the Secretary of War, recommending that no increase in diversion should be authorized, and on June 30, 1910, the Acting Secretary of War authorized the construction of the Calumet-Sag channel upon certain conditions, including the submission of this question to Congress, a prohibition against obstructions to navigation, and a condition that the total amount of abstraction should not exceed the maximum already permitted by the Secretary of War (4167 c.f.s), and also that this permit should not be used in the suit begun by the Federal Government against the Sanitary District. (M. R. 59.) On February 5, 1912, the Sanitary District of Chicago applied for permission to withdraw 10,000 c.f.s. from Lake Michigan through the Chicago and Calumet Rivers, for the purpose of sewage disposal by dilution. (M. R. 61.) Under date of February 28, 1912, the Chief of Engineers reported to the Secretary of War that the application should be denied, advising that 1,000 c.f.s. of water from Lake Michigan was sufficient for navigation purposes alone, and that the installation of modern methods of sewage treatment would obviate the necessity for a large diversion of water, and that such diversion would seriously affect lake levels and the water power development capacity of the Niagara and St. Lawrence Rivers. (M. R.

61, 62.) On January 8, 1913, the Secretary of War rendered an exhaustive opinion denying the application of the Sanitary District setting forth in detail why 1,000 c.f.s. of water from Lake Michigan was sufficient for all purposes, calling attention to the lowering of lake levels as a serious menace to navigation, also calling attention to International Relationship with Canada, and stating that Chicago had not attempted to solve its sewage disposal problem in the proper manner, stating as his conclusion that the proposed diversion would interfere substantially with the navigable capacity of the navigable waters of the Great Lakes and their connecting rivers. (M. R. 62-66), (J. R. 145-158.)

Following this determination and denial of the application of the Sanitary District, the Attorney General of the United States, on October 6, 1913, filed another bill in equity in the same federal court, to enjoin the Sanitary District from diverting more than 4,167 c.f.s. from Lake Michigan, which was joined with the earlier action, and which resulted in a decree ten years later, June 18, 1923, in the Government's favor. (M. R. 72.) The Sanitary District appealed to the Supreme Court of the United States, which upheld the contentions of the Government on January 5, 1925, and entered a decree restraining these defendants from abstracting or diverting more than 4,167 c.f.s. of water from Lake Michigan (Sanitary District vs. United States, 266 U. S. 405.)

On January 13, 1925, the Sanitary District applied to the Secretary of War for permission to divert 10,000 c.f.s. from Lake Michigan for the stated purposes of eliminating offensive conditions along the Illinois River, to keep the Chicago River reversed at all times so that during storm periods it would not pour sewage into Lake Michigan and also to protect the health conditions of Chicago. (M. R. 73.) The District Engineer at Chicago recom-

mended a conditional, temporary permit for the purpose of compelling the Sanitary District to construct sewage disposal works within a reasonable time, so as to permit a reduction in the quantity of water diverted. (R. 75, 76.) On March 3, 1925, the Secretary of War issued a permit to the Sanitary District of Chicago purporting to authorize the diversion of 8,500 c.f.s. from Lake Michigan upon certain conditions including a prohibition against unreasonable interference with navigation, requiring a program for the treatment of sewage, posting a bond for its share of the cost of regulating works, and requiring the metering of water for the domestic use of the city of Chicago. The permit was revocable at will and was to expire December 31, 1929. (M. R. 79-80.) In forwarding a copy of the permit to the Sanitary District of Chicago, the Secretary of War advised the Sanitary District that it was the policy of the War Department to hold the taking of an excessive amount of water for sanitation at Chicago as affecting navigation on the Great Lakes adversely and that the diversion of water from Lake Michigan should be reduced to reasonable limits with utmost despatch. (M. R. 80.) Under this permit the Sanitary District claims authority to divert and abstract these waters from Lake Michigan. (M. R. 81.)

Following the granting of this permit and on May 7, 1925, the Government of Canada began diplomatic correspondence concerning the amount of the Chicago diversion and when it would be stopped or cut down. (M. R. 83-85.) Three specific questions were propounded which were answered by the Secretary of State of the United States, June 15, 1925, stating the terms of the permit and that the flow at Lockport amounted to 9,700 c.f.s. (M. R. 85.)

The sewer system of Chicago is a combined system carrying both storm water and sewage, originally draining principally into the Chicago River and its branches. (M. R. 20.) Two large intercepting sewage systems on the south side and on the north side of Chicago were so constructed as to flush the sewage into the main drainage canal by water abstracted from the Lake. There was also constructed what was known as the North Shore Channel, starting from Lake Michigan at Wilmette, and connecting with the North Branch of the Chicago River, which carried the sewage from the north shore sewage system, by reason of the flushing of water pumped into it from Lake Michigan. (M. R. 21.) The same process carried the sewage from the Calumet intercepting sewage system into the Calumet-Sag Canal. (M. R. 21.) Thus all of the sewage of the Sanitary District was flushed into and through the main channel by means of this abstraction of water from Lake Michigan. (M. R. 21.) In order to accomplish this result, large quantities of water were abstracted from Lake Michigan and passed through the drainage canal, in addition to the quantity of water pumped from the Lake by the city of Chicago for its domestic water supply, and then passed into the drainage canal. (M. R. 20, 21, 81.) The mean annual quantities of water abstracted from Lake Michigan and passed through the drainage canal constitute an increasing diversion, amounting to at least an average of 8,674 c.f.s. between 1920 and 1924. (M. R. 22, 23.) This amount of water does not include the added diversion of 503 c.f.s., being the flow the Chicago basin under natural conditions would have contributed to the supply of the Great Lakes-St. Lawrence system, but which was diverted also. (M. R. 23.)

The flow of all of the water abstracted and diverted from Lake Michigan passes through the drainage canal

into the Mississippi watershed, and becomes permanently lost to the Great Lakes-St. Lawrence Waterway System. (M. R. 23.)

4. EFFECT OF THIS ABSTRACTION OF WATER FROM LAKE MICHIGAN UPON THE LEVELS AND NAVIGAPLE CAPACITY OF THE GREAT LAKES-ST. LAWRENCE SYSTEM.

The Special Master found the facts to be in substantial accordance with the claims of complainant,—that this abstraction of water from Lake Michigan by defendants had caused a lowering of the levels of the Great Lakes, so that Lakes Michigan and Huron and their connecting waters were lowered at least six inches, and that Lakes St. Clair, Erie and Ontario were lowered approximately five inches. (M. R. 104.) The Special Master rejected defendants' claims (M. R. 104), basing his findings upon testimony which included the report of the International Waterways Commission of the United States and Canada, January 4, 1907 (M. R. 95), the report of the Board of Engineers for Rivers and Harbors, August 24, 1920 (M. R. 67), the report of the Joint Board of Engineers, United States and Canada, November 16, 1926 (M. R. 96), the testimony of Colonel Pillsbury, United States Army Engineer in charge of the United States Lake Survey, and the records of that Survey (M. R. 99-102). The special Master found as follows (M. R. 104, 105):

> "I find that the full effect of a diversion of 8,500 c.f.s. of water from Lake Michigan at Chicago through the drainage canal of the Sanitary District would be to lower the levels of Lakes Michigan and Huron approximately six inches at mean lake levels; the levels of Lakes Erie and Ontario, approximately five inches at mean lake levels; and the levels of the connecting rivers, bays and harbors, so far as they

have the same mean levels as the above-mentioned lakes, to the same extent, respectively. * * *

"I find that the diversion which has taken place through the Chicago drainage canal has been substantially equivalent to a diversion of about 8,500 c.f.s. for a period of time sufficient to cause, and has caused, the lowering of the mean levels of the lakes and the connecting waterways practically to the extent above stated.

"I find, further, that an increase of the diversion at Chicago above 8,500 c.f.s. would cause an additional lowering of the levels of the lakes and their connecting waterways in proportion to the amounts above stated. Thus a diversion of an additional 1,500 c.f. s. or a total diversion of 10,000 c.f.s. would cause an additional lowering in Lakes Michigan and Huron of about one inch, and in Lakes Erie and Ontario a little less than one inch, with a corresponding additional lowering in the connecting waterways having the same levels as the lakes respectively.

"I also find that if the diversion at Chicago were ended, assuming that other diversions remained the same, the mean levels of the lakes and rivers affected by the Chicago diversion would be raised in the course of several years (about five years in the case of Lakes Michigan and Huron and about one year in the case of Lakes Erie and Ontario) to the same extent as they had been lowered, respectively, by that diversion."

5. EFFECT OF THIS ABSTRACTION OF WATERS UPON COMMERCE, NAVIGATION AND OTHER INTERESTS OF THE STATE OF MICHIGAN AND ITS PEOPLE.

The State of Michigan, with 2,391 miles of shore line, has 16,653 square miles of Lake Superior, 12,922 square miles of Lake Michigan, 9,925 square miles of Lake Huron, and 460 square miles of Lakes St. Clair and Erie within its boundaries. (M. R. 106.) Hence the interest of the State of Michigan, and its people is manifest in the Lake levels and connecting waters of the Great Lakes-St.

Lawrence System throughout, and particularly in that portion which lies within its boundaries. By reason of its ports and commerce, the State of Michigan and its people are vitally concerned in the effect on navigation and commercial interests caused by lowering the Great Lakes due to the Chicago abstraction. (M. R. 112.)

The amount of permissible draft of vessels carrying the greater portion of the freight traffic between Lake Superior and Lake Erie has been increasingly important. (M. R. 113.) There are *critical points* in navigating the St. Marys and St. Clair Rivers, Lake St. Clair, and the Detroit River and other connecting waterways, and vessels must of necessity be loaded to available depths at such points. A lowering of the levels of the lakes increases the hazards and dangers of navigation, contributes to groundings and strandings, and actually prohibits the loading of vessels to anywhere near their capacity, because of the necessity to navigate these *critical points* in the connecting waters between these lakes. (M. R. 115.) It is manifest that although Lake Superior is not affected by the Chicago diversion, yet all commerce leaving or arriving at Lake Superior ports, must contemplate the lower lake levels of the other lakes and their connecting waters because of the critical points which must be navigated, and accordingly, commerce upon that lake is as much affected, and perhaps more so, because of its present character, i. e., grain, iron ore and other commodities that have their point of origin in the Lake Superior region. (M. R. 114.) The rest of the Great Lakes, being lowered approximately six inches or more, must constantly recognize the permissible draft of all vessels, because of these critical points. (M. R. 113, 114.)

Transportation upon the lakes has been done upon the basis that channel depths and widths would be suitable for at least a twenty-foot draft. (M. R. 114.) Since 1906

all freighters have been constructed upon a draft theory of twenty-three to twenty-four feet, with commensurate length and beam. A third lock was authorized in 1906 for St. Marys Falls, 80 by 1,350 feet, with sills set at a depth of 24.5 feet, thus providing at that time for future ship drafts, consistent with the adopted sill depths. A fourth lock of the same dimensions was authorized and constructed. But as a practical matter, a twenty-foot draft, through the complete navigation season, has rarely been provided for, at least since the Chicago diversion. (M. R. 113, 114.) The percentage of the season, when less than twenty-foot drafts were employed, was as follows: 1921, forty-five per cent; 1922, eighty-five per cent; 1923, eighty-two per cent; 1924, one hundred per cent. The effect of a reduction of six inches of draft as measured in the adverse consequences upon lake shipping due to the receded levels of the lakes below St. Marys Falls, is illustrated by the 1923 Lake Superior trade. The year's business was done on the following drafts: From May 1 to 31, 19 feet; May 31 to July 19, 19 feet, 6 inches; July 10 to August 28, 20 feet; August 28 to December 18, 19 feet, 6 inches. The report of Colonel E. M. Markham, United States District Engineer, at Detroit (May 19, 1925) stated: (M. R. 114)

> "Consideration of individual loaded boats and of their respective dimensions show that, if water had been available for an additional six inches of draft, the fleet could have handled for the year 3,346,000 tons more than was actually transported, or to put the matter in another light, the season's business could have been done with the elimination from service of about 30 freighters of the 2,000-3,000 ton class. It should be emphasized that the reference is to Lake Superior trade alone. It is estimated that the lost tonnage of the total through business of the Lakes for 1923, incident to a 6-inch deficiency of draft, ex-

ceeded 4,000,000 tons. The average water-haul rate for the year was 88 cents per ton.

"For the year just closed" (1924) "shipping was done on a draft throughout of 19 feet, with occasional exceptions up to 19 feet 6 inches. The year's 'tonnage loss' applicable to the total lake trade, reckoned from a base draft of 20 feet, was probably in excess of seven millions. For the season of 1925, shipping has opened at a draft of 18 feet 6 inches, with the unlikelihood that the best water of the year will permit a safe draft in excess of 19 feet.

"From the above outline of lake commerce, and of the number, dimensions and capacity of the lake freighters doing its bulk business, two facts become evident: First, that the existing fleet could carry seasonally, on drafts for which designed, something like twenty-five to thirty million tons in excess of the cargo possible of transport by the same boats over the channel depths now available; second, that the loss of inches in channel depth due to receding levels or otherwise is a matter of large import with respect to shipping efficiency and to the transportation charges of the bulk commodities concerned."

With the loss of every inch of draft below twenty feet, the modern, lake, bulk freighter suffers a loss of from 90 to 100 tons in cargo capacity. It will gain a corresponding amount for every inch of draft in excess of 20 feet. (M. R. 115.) The Special Master has found as follows: (M. R. 116)

"The defendants point to other diversions and artificial changes in the Great Lakes and connecting channels, which have contributed to this total lowering of levels. It is evident, however, that during a period in which the level of the Great Lakes is being lowered, an additional lowering, even of six inches, would be even more serious in its consequence than if it occurred at a time when other causes did not operate to lower the levels of the lakes or operated to raise them.

"These are not actions for damages, and it is not necessary to attempt to estimate with precision the

> extent of the damage caused by a lowering of six inches in lake levels. The defendants have introduced evidence for the purpose of showing that the claims of damage have been exaggerated, but after considering the testimony and critical analyses presented by the defendants, I am satisfied that the evidence requires the finding that the lowering of lake levels of approximately six inches has had a substantial and injurious effect upon the carrying capacity of vessels, and has deprived navigation and commercial interests of the facilities which otherwise they would have enjoyed in commerce on the Great Lakes."

In addition to the damage to commerce and navigation, the State of Michigan and its people have suffered great damage to their ports and inner harbors (M. R. 49-107) and to fishing and hunting grounds, beaches and summer resorts, public parks, and the state ferry between Mackinaw City and St. Ignace across the Straits of Mackinac. (M. R. 117.)

Ports and inner harbors which have been constructed at vast expense by the federal and local governments, and have been maintained at continuous cost for upkeep and dredging have been directly affected, because the levels of the ports and inner harbors, being identical or directly dependent upon the levels of the lakes, have themselves, been lowered. (M. R. 49-107.) This has caused the water in these ports to become too shallow to serve for practical commercial purposes, and these ports and inner harbors must either be deepened, excavated and dredged (which because of the nature of some of the harbors, is a practical impossibility), or they must become useless for commercial purposes in serving lake traffic, because unable to afford the depth required for navigation on a practical basis. (M. R. 107.)

In his report of February 23, 1907, the Chief of Engineers said: (M. R. 49)

"3. In my opinion, this abstraction will undoubtedly lower the levels of all the waters of the Great Lakes, except those of Lake Superior, and thus diminish the navigable capacity and depth of the various channels and harbors which have been deepened and improved under authority of Congress.

"4. Leaving out Lake Superior, there are more than 100 works of river and harbor improvement on the Great Lakes and their connecting waters, for which appropriations aggregating more than 80 millions of dollars have been made. The application of this vast sum has resulted in securing and maintaining specified depths and widths of channel, which Congress has decided to be required for the accommodation of the traffic using these waters."

"5. To diminish these depths, even to a slight extent, would not only prove a serious injury to the traffic, but would practically undo the work which has been accomplished by Congressional direction and necessitate the expenditure of further large sums of money for restoration."

The improved ports and inner harbors of Michigan have thus suffered serious impairment. Also a large number of unimproved harbors, which have navigable capacity and which are used by pleasure and fishing boats and small craft, have been directly affected. (M. R. 105, 117.)

The State of Michigan and its people, because of the nature of the water, land and climate, have large fishing and hunting areas along its lake borders, which are directly affected by the lowering of the lake levels. Fishing and hunting grounds have been rendered less desirable and in some cases have been altogether taken away by the lowering of lake levels, and the people, whose right it has been from time immemorial to fish and hunt upon the public waters within the State of Michigan, have been prevented from exercising this ancient right, not

only to commercial damage in large amounts, but in their private rights and enjoyment in this respect. (M. R. 117.)

Beaches at summer resorts have been rendered unavailable or practically inconvenient to the point of rendering them almost useless, because of this Chicago diversion. Shallow beaches being a requirement for summer resorts, quickly reflect a lowering of lake levels of even a small amount. The effect of a lowering of six inches upon beaches at summer resorts is to cause the water to recede from the meander line (ordinary beach line) a distance in some cases of upwards of a quarter to a half mile. The effect of this lowering has been to render practically valueless a large amount of summer resort and beach property in which the State of Michigan and its people have invested enormous sums of money, not only in private homes, cottages and residences, but in commercial property used in connection with these beaches. (M. R. 117.) The State of Michigan has twenty-six public parks littoral to the Great Lakes which are directly affected in their availability and convenience for use by the people for park purposes, by reason of the lowering of lake levels. (M. R. 117.) The State of Michigan also operates ferries for the service of the general public as a part of its highway system, across the Straits of Mackinac, and because these waters constitute a *critical point* in the connecting waters between Lakes Michigan and Huron, and constitute a part of the shoal areas, these ferries are impaired in usefulness. The car ferries operated across Lake Michigan are also impaired in usefulness by the lowering of the waters of Lake Michigan. (M. R. 112.)

Thus the State of Michigan and her people have suffered tremendous damage, not only to their commerce and navigation upon the Great Lakes, amounting to millions of dollars, but also to their ports and inner harbors, beaches, summer resorts, public parks, fishing and hunt-

ing grounds, and ferry system, which constitute a substantial, far-reaching and serious damage to the rights of the State of Michigan as sovereign, and proprietary owner and as *parens patriae* of its people. (M. R. 117.)

The Special Master, in his finding of fact, says: (M. R. 117, 118)

> "But there is sufficient evidence to require the finding that a lowering of six inches has been a substantial contribution to the injury caused by the total reduction, in connection with fishing and hunting grounds, the availability and conveniences of beaches at summer resorts, and public parks." * * *
>
> "My conclusion on this branch of the case is that, while the damage proved to have been sustained by the complainants has been due to the combination of causes which have brought about the total lowering of the levels of the lakes and connecting waters, the contribution made by the diversion of the water of Lake Michigan through the Chicago drainage canal must be regarded as substantial, although the proportion of the damage caused by the reduction of approximately six inches is not susceptible of exact computation.
>
> "I therefore find that the complainants have established that the diversion through the Chicago drainage canal has caused substantial damage to their navigation, commercial and other interests as above stated."

ARGUMENTS ON THE FACTS.

The Defendants have not excepted to the Report of the Special Master, but this should not be interpreted as demonstrating in the slightest degree that the Special Master upheld defendants' claims *on the facts. On the contrary, the Special Master has found with complainant on all of the major issues of fact considered in this case.*

The following issues of fact have been clearly decided

in complainant's favor, and in complete accord with the claims of the State of Michigan;—

1. That the effect of this Chicago diversion has been to lower the levels of the Great Lakes and their connecting waters six inches. (M. R. 104, 105.)

2. That this has caused substantial damage to commerce and navigation upon the whole of the Great Lakes-St. Lawrence Waterway System. (M. R. 116.)

3. That this diversion has caused extensive damage to numerous improved ports and inner harbors. (M. R. 107, 116.)

4. That this abstraction has impaired and damaged the numerous beaches and summer resorts of the State of Michigan. (M. R. 117.)

5. That this abstraction has impaired and damaged the numerous fishing and hunting grounds, including the public parks of the State of Michigan. (M. R. 117.)

These findings of fact which are most vital to the determination of this case have all been found in favor of complainant. However, there are a few findings which are not in entire accord with the clear weight of testimony, and an omission to find some facts which should follow the findings that have been made.

I. THE CHICAGO SANITARY CANAL IS AN ARTIFICIALLY CONSTRUCTED CHANNEL, WHICH IS NOT NOW AND NEVER HAS BEEN A NAVIGATION PROJECT, BUT ALWAYS HAS BEEN IN REALITY A SANITATION AND POWER ENTERPRISE FOR THE BENEFIT OF THE STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO.

(Exceptions No. 1, 5, 7, 8, 11 and 15 relate to this subject.)

The Special Master indicated this result but did not make a definite finding of fact to this effect.

a. *Defendants themselves have always dealt with the Chicago Sanitary Canal as a sanitation project.*

The Sanitary District of Chicago and the State of Illinois were likewise defendants in the case of Sanitary District v. United States, 266 U. S. 405, 69 L. Ed. 352. Their position in that case was that the sanitary canal was a sanitation and power project. Prior to that time there had never been any serious claim on their part that it was anything else. After this court, in that case, decided that the defendant had no right to abstract, divert, and appropriate the waters of the Great Lakes-St. Lawrence Waterway System for local sanitation and power purposes, defendants then claimed they were public benefactors, establishing a system of navigation, and thereupon the sanitary canal became a *navigation* enterprise instead of a *sanitation* and *power* project.

The Sanitary District of Chicago was created by an Act of Illinois, in 1889, entitled: "An Act to create sanitary districts, etc." In People v. Nelson, 133 Ill. 565, 27 N. E. Rep. 217, it was said:

> "A sanitary district is a municipal corporation organized to secure, preserve and promote the public health."

In Chicago v. Green, 238 Ill. 258, 87 N. W. 417, the court said:

> "The purpose of the Act of 1899 was to furnish a common outlet for the sewage of the incorporated municipalities within the limits of the district."

In Beidler v. Sanitary District, 211 Ill. 628, 637, the Illinois Supreme Court in October, 1904, said:

> "Here the waters were taken and their general levels reduced for the purpose of making navigable an artificial channel, and not for the purpose of facilitating the navigation of the south branch of the Chicago River or any stream or body of water naturally emptying into it or any stream or lake into which it naturally empties.
>
> "Again, it is evident, from an examination of the act for the creation of sanitary districts, that the primary and principal purpose of their creation under the statute is to provide for the preservation of the public health by improving the facilities for the final disposition of sewage and by supplying pure water. The fact that a navigable waterway may be created is a mere incident, and not one of the purposes for which a sanitary district is created."

The Sanitary Canal was opened in January, 1900. The Constitution of Illinois of 1870, independent section 3, and the statutes in pursuance thereof (Starn & Curtis Statutes, 1896, p. 206) forbade the loaning of its credit or making appropriations in aid of canals, and the necessary effect of this was upheld in Burke v. Snively, 208 Ill. 328; 70 N. E. 327.

It is evident that the State of Illinois could act only through the medium of the Sanitary District in building and operating a sanitary canal solely as a sanitation project and not as a canal for the purpose of navigation. Hence, from the very outset the State of Illinois, through its courts, definitely determined that this was a project for sanitation and not navigation.

That this is the fact is also borne out by the requests of the Sanitary District to the War Deparement for permission to divert water from the Chicago River to aid in the disposition of the sewage of Chicago, and to prevent

that sewage entering Lake Michigan and polluting the water supply of Chicago.

Illustrating this attitude on the part of the Sanitary District is its application following the action of the Secretary of War of April 9, 1901, in reducing the flow through the Chicago River of not to exceed 200,000 cubic feet per minute, in applying for a permit in this language: (M. R. 42)

> "that the water in the main drainage channel has become greatly polluted and very offensive both to sight and smell, and is working such hardship upon the valley communities as to evoke frequent protest from various cities and municipalities along the Des Plaines and Illinois Valleys."

Further illustrating this attitude on the part of the Sanitary District, is its application of February 5, 1912, to the Secretary of War, setting forth the "needs of Chicago" as a basis for asking permission to withdraw water from Lake Michigan through the Chicago and Calumet Rivers. (M. R. 61.)

After the decision of the case of Sanitary District v. United States, *supra,* wherein it was decreed that the defendants be enjoined from diverting more than 4,167 c.f.s. from Lake Michigan, these defendants applied to the Secretary of War for an increase in the amount of authorized abstraction from Lake Michigan, alleging as the main purpose for such added diversion the elimination of offensive conditions along the Illinois River, to keep the Chicago River reversed at all times, so that even during storm periods it would not pour sewage into Lake Michigan, and further alleging that the authorized diversion would not accomplish this purpose, and without mention of navigation, thus clearly indicating that the water was needed solely for sanitation. (M. R. 73-74.)

b. *The War Department has dealt with the Sanitary Canal as a sanitation project.*

The War Department has dealt with the Sanitary Canal as a sanitation project from the beginning. The first permit from the Secretary of War, under date of July 3, 1896, recited: (M. R. 34)

> "I have the honor to acknowledge the receipt of your letter of the 16th ultimo requesting permission to make certain changes in the capacity of the channel of the Chicago River, *for drainage purposes,* at points indicated on the map, etc. * * *
>
> "2. That this authority shall not be interpreted as approval of the plans of the Sanitary District of Chicago to introduce a current into Chicago River. This latter proposition must hereafter be submitted for consideration.
>
> "3. That it will not cover obstructions to navigation, by reason of this work while in progress, or when completed."

In the permit of May 8, 1899, from the Secretary of War, there were recited as conditions that the questions would be submitted to Congress, and: (M. R. 39)

> "2. That if, at any time, it becomes apparent that the current created by *such drainage works* in the South and main branches of the Chicago River be unreasonably obstructive to navigation or injurious to property, the Secretary of War reserved the right to close said discharge, etc."

On April 9, 1901, the Secretary of War "*heeding the protests of commercial and navigation interests,* directed the Sanitary District to regulate the discharge so that the maximum flow through the Chicago River and its South Branch should not exceed 20,000 cubic feet per minute," (M. R. 41), and on July 23, 1921, amended the former

order so as to permit an increase in flow between four p. m. and twelve o'clock midnight, daily. (M. R. 42.) On December 5, 1901, the Secretary of War authorized a flow of 250,000 cubic feet per minute during the entire day with former *conditions against interfering with navigation.* (M. R. 42.) On January 17, 1903, another permit was granted allowing a diversion of 350,000 cubic feet per minute, until March 31, 1903, during the closed season of navigation, "in order to carry off the accumulations of sewage deposits lining the shores of the city," with the provision that, after said date, the flow should be reduced to 250,000 cubic feet per minute as required by the permit of December 5, 1901. (M. R. 43.)

From this dealing with the abstraction of waters from Lake Michigan it is evident beyond argument that the Secretary of War, in *"heeding the protests of commercial and navigation interests"* was cutting down the abstraction to *save navigation.* In permitting an increase between four p. m. and midnight he showed a desire to aid sanitation at a time when it would protect navigation by letting the water flush the sewage at a time when it would do the *least harm* to navigation. In permitting an increased flow *during the closed season of navigation,* he demonstrated the impairment that such flow must cause during the *open season of navigation.* Could anything be plainer from the very beginning than that this was a *sanitary project* and was in fact *detrimental to navigation?*

When the Calumet-Sag channel project was brought before the War Department on the application of the Sanitary District to obtain 4000 c.f.s. additional abstraction, the Chief of Engineers reported under date of February 23, 1907, (M. R. 49):

> "3. In my opinion, this abstraction will undoubtedly lower the levels of all the waters of the Great

Lakes, except those of Lake Superior, and thus diminish the navigable capacity and depth of the various channels and harbors which have been deepened and improved under authority of Congress.

"4. Leaving out Lake Superior, there are more than 100 works of river and harbor improvement on the Great Lakes and their connecting waters, for which appropriations aggregating more than 80 millions of dollars have been made. The application of this vast sum has resulted in securing and maintaining specified depths and widths of channel, which Congress has decided to be required for the accommodation of the traffic using these waters.

"5. To diminish these depths, even to a slight extent, would not only prove a serious injury to the traffic, but would practically undo the work which has been accomplished by Congressional direction and necessitate the expenditure of further large sums of money for restoration."

Later, in granting a permit for the Calumet-Sag channel on June 30, 1910, the Acting Secretary of War, stated among the conditions of his permit: (M. R. 59.)

"(b) That if at any time it becomes apparent that the current created by such drainage work in the Calumet as well as Chicago Rivers be unreasonably obstructive to navigation, or injurious to property, the Secretary of War reserves the right to close the discharge through said channels or rivers, or to modify it to such an extent as may be demanded by navigation and property interests along said rivers."

What could be plainer than that the Secretary of War was at all times fearful of the harmful effect upon navigation? Instead of this diversion being a navigation project, the prospective injury to navigation caused more constant concern than perhaps any other peace time problem considered by the War Department.

The Chief of Engineers considering the application for a permit (M. R. 61) advised on February 28, 1912, that a diversion of less than 1000 c.f.s. from Lake Michigan would supply any reasonable demands of navigation from Lake Michigan to the Mississippi River, and that any greater diversion was a greater injury than benefit to navigation; that the dumping of sewage into the rivers was becoming more objectionable and it was expected that the provisions made elsewhere against sewage contamination would be followed in Illinois, after which there would be no reason for continuing the diversion of large quantities of Lake Michigan water, except for local benefit, as such diversion would no longer be necessary for sanitation and was not required for navigation between Lake Michigan and the Mississippi, (M. R. 61) and that from the standpoint of conservation of water power, diversion from Lake Michigan into the Illinois River was an economic loss. And on the same subject the Secretary of War, on January 8, 1913, rendered an elaborate opinion, in which he said: (M. R. 63.)

> "On the other hand, the demand for the diversion of this water at Chicago is based solely upon the needs of that city for sanitation. There is involved in this case no issue of conflicting claims of navigation." (M. R. 63.)

And later on in his opinion, he further says:

> "Having reached the conclusion that the proposed diversion of the water of Lake Michigan would *substantially injure the interests of navigation on the Great Lakes*, which it is my legal duty to protect, it would clearly follow that the present application should be denied."

On February 2, 1922, a subsequent Secretary of War, in a communication to Congress concerning a pending

bill, thus stated the policy of the Department: (M. R. 71.)

> "It is clear that, under the conditions of affairs created by the Chicago Sanitary District, the diversion of a certain quantity of water is necessary at present for the proper protection of the health of the citizens of Chicago. * * * It is my view that the quantity authorized should be limited to the lowest possible *for sanitation*, after the sewage has been purified to the utmost extent practicable before it is discharged into the sanitary canal."

The Secretary of War in granting the permit of March 3, 1925, purported to give permission to take an amount of water not to exceed an annual average of 8,500 c.f.s. upon conditions that clearly contemplated treatment of Chicago sewage under the supervision of the United States District Engineer at Chicago, only mentioning navigation to the extent of prohibiting defendants from further interfering with navigation by such diversion. (M. R. 78, 79.) In his letter of transmittal the Secretary of War, under date of March 3, 1925, said:

> "This Department has always held and continues to hold, that the taking of an excess amount of water for sanitation at Chicago does affect navigation on the Great Lakes adversely, and that this diversion of water from Lake Michigan should be reduced to reasonable limits with utmost despatch." (M. R. 80.)

From the foregoing statements and the policy established by the War Department respecting this abstraction at Chicago, it seems conclusive that this project is solely *for sanitation* and the only relation it can possibly bear to the question of navigation is to "*affect navigation adversely.*"

II. THE GREATEST AMOUNT OF WATER REQUIRED TO BE ABSTRACTED FROM LAKE MICHIGAN FOR THE NEED OF NAVIGATION FROM LAKE MICHIGAN TO THE MOUTH OF THE ILLINOIS RIVER WOULD BE 1000 C.F.S.

(Exceptions No. 11 relates to this subject.)

In Sanitary District vs. United States, 266 U. S. 405, 431, this Court said:

> "It seems that a less amount than now passes through the canal (4167 c.f.s.) would suffice for the connection which the United States has wished to establish and maintain."

Yet the Special Master said: (M. R. 122.)

> "The complainants contend that if the water for lockage and navigation purposes of this waterway from Lake Michigan to the mouth of the Illinois River is or should be taken from the Great Lakes-St. Lawrence watershed, a diversion of less than 1,000 c.f.s. of water is sufficient to supply all the needs of navigation. I am unable to so find."

The Special Master bases his reason for this statement upon the possibilities attending the Act of January 21, 1927. (M. R. 85, 122.) But in this very act (44 Stat. Pt. 2, 1010, 1013) and quoted at another place by the Special Master (M. R. 85), it was provided:

> "Provided, further, That nothing in this Act shall be construed as authorizing any diversion of water from Lake Michigan."

In fact, the Special Master makes use of this very clause (M. R. 189, 190) to foreclose Complainant's argu-

ment as to the construction Congress desired to place upon the Act of March 3, 1899, when he said:

> "I do not think that it can be said that the proviso in the act approved at the last session of Congress (January 21, 1927, 44 Stat., Pt. 2, 1010, 1013) with respect to a modification of the existing project on the Illinois River, that 'nothing in this act shall be construed as authorizing any diversion of water from Lake Michigan' affects the question as to the construction of the Act of 1899 or limits the power of the Secretary of War thereunder. This proviso was inserted in the act while the present suit was pending and *it appears to have been intended to leave the contentions of both parties to this controversy unaffected by the provision which was enacted as to the improvement of the Illinois River.*"

It would appear that this reason would apply with equal force to prevent the Special Master from using this same Act of January 21, 1927, to argue the facts respecting the sufficiency of a flow of 1000 c.f.s. for all purposes of navigation from Lake Michigan to the mouth of the Illinois River.

But considering the effect of the Act of Jan. 21, 1927, Congress provided:

> "Illinois River, Illinois: Modification of existing project so as to provide a channel with least dimensions of nine feet in depth and two hundred feet in width from the mouth to Utica; * * * " (M. R. 85.)

This was the very type of canal reported upon by the Government Engineers.

> The amount of water necessary for navigation upon the Des Plaines—Illinois Waterway was reported upon by the Special Board on the Waterways under the Chairmanship of General W. H. Bixby,

Chief of Engineers under date of Jan. 23, 1911 as follows:

"The Board considers a bottom width of 160 feet in canal and 200 feet in the open river above the mouth of the Illinois River sufficient for a channel of eight or nine feet available depth. For safety and ease of navigation the channel should be extended to 11 feet in rock cuts and canals, and the locks should be given 11 feet depth, 80 feet width, and 600 feet useful length. With these lock dimensions three barges carrying about 9,000 tons of freight may be locked through with their tow-boat. A waterway of these dimensions would have a capacity exceeding 100,000,000 tons per annum and would accommodate barge tows carrying about nine times the ordinary train-load of this vicinity. In addition the vessels using it would be capable of navigating the Ohio and Lower Mississippi Rivers. *Such waterway will not require a diversion of more than 1,000 second feet from Lake Michigan,* this amount would not injuriously lower lake levels nor cause excessive flooding of land in the Illinois Valley." (J. R. 44)

"(J. R. 45) For purposes of navigation a diversion from Lake Michigan of less than 1,000 second feet of water is all that will be necessary." " * * The claim that more than 1,000 cubic feet per second is required for purposes of navigation cannot be maintained."*

If there is any one idea that runs through the different reports of the Chief of Engineers and House and Senate Documents, as well as the Secretary of War's findings, from time to time, it is the unanimity with which it has been found that 1,000 c.f.s is all that could ever be needed for navigation purposes in this water way.

The Chief of Engineers advised the Secretary of War, February 28, 1912, that:

A diversion of less than 1,000 c.f.s. from Lake Michigan would supply any reasonable demands for

> navigation from Lake Michigan to the Mississippi, and any greater diversion was a greater injury than benefit to navigation. (M. R. 61.)

and also:

> that on the assumption that the waterway to the Mississippi River should in the future provide for the passage of boats of over 20-foot draft, or any other greater draft useful in the Great Lakes, such navigation could be maintained with a diversion from Lake Michigan of less than one-fifth of that at present in progress, (4167 c.f.s.) and less than one-fourteenth of that then desired by the State authorities. (M. R. 62.)

The Secretary of War, in his opinion of January 8, 1913, said:

> "The Chief of Engineers reports that so far as the interests of navigation alone are concerned, even if we should eventually construct a *deep* waterway from the Great Lakes to the Mississippi over the route of the sanitary canal, the maximum amount of water to be diverted from Lake Michigan need actually be not over 1,000 feet per second, or less than a quarter of the amount already being used for sanitary purposes in the canal. This estimate is confirmed by the report of the special board of engineers on the deep waterway from Lockport, Ill., to the mouth of the Illinois River, dated January 23, 1911. It is also confirmed by the practical experience of the great Manchester Ship Canal in England. From the standpoint of navigation alone in such a waterway too great a diversion of water would be a distinct injury rather than a benefit. It would increase the velocity of the current and increase the danger of overflow and damage to adjacent lands." (M. R. 63.)

Again, in the final report of the special board on the waterway from Lockport to the mouth of the Illinois River (House Document 762, 63rd Congress, 2d Session, p. 14) dated December 16, 1913, it is said:

> " * * * The Board reiterates that a diversion exceeding 1,000 second feet is not necessary for navigation purposes alone in the Illinois River, and that an added discharge will produce a slight and inadequate effect on the Mississippi River." (J. R. 42.)
>
> "For purposes of navigation a diversion from Lake Michigan of less than 1,000 second feet of water is all that will be necessary." (J. R. 42.)

III. THIS DIVERSION IS NOT FOR NAVIGATION UPON A LAKE MICHIGAN-TO-MISSISSIPPI WATER COURSE, BECAUSE ABSTRACTIONS IN EXCESS OF 1,000 C.F.S. HAVE AFFECTED NAVIGATION IN THE CHICAGO RIVER ADVERSELY.

(Exceptions Nos. 1, 5, 7, and 11 relate to this subject.)

Since January 17, 1900, when the flow of the Chicago River was reversed, a current has been introduced into that river (M. R. 38), which has made it increasingly impossible for large boats to navigate, until now there is no practical navigation by large lake boats upon the Chicago River. To keep the Chicago River reversed at all times so that the sewage would be discharged into the Sanitary Canal and not into Lake Michigan, it has been necessary to take increasingly large amounts of water to accomplish *this purpose,* and that is what has created the current in that stream. This current has virtually driven all commerce from the River.

The very first permit granted by the Secretary of War on July 3, 1896, provided:

"* * * * 2. That this authority shall not be interpreted as approval of the plans of the Sanitary District of Chicago to introduce *a current into the Chicago River*. This latter proposition must be hereafter submitted for consideration. * * * " (M. R. 35.)

Other permits contained the same conditions, including the permit of May 8, 1899, (the first permit purporting to authorize the reversal of the Chicago River):

"* * * * 3. That the Sanitary District of Chicago must assume all responsibility for damage to property and navigation interests by reason of *the introduction of a current in Chicago River.*" (M. R. 39.)

While the application for the permits of 1900 (which contained the same conditions) were under consideration by the Secretary of War, the Lake Carriers Association requested (May 16, 1900) action by the Secretary of War modifying the amount of discharge through the drainage canal, *in order to avoid excessive current in the Chicago River.* (M. R. 41.)

On April 9, 1901, the Secretary of War, heeding the protests of commercial and navigation interests, directed the Sanitary District to regulate the discharge so that the maximum flow through the Chicago River and its South Branch should not exceed 200,000 cubic feet per minute. (M. R. 41.) And this was followed on July 15, 1901, by another request from the Sanitary District for an increased flow because the water of the main drainage canal "has become greatly polluted and very offensive both to sight and smell, and is causing such hardships upon the valley communities as to evoke frequent protests from various cities and municipalities along the Des Plaines and Illinois Valleys". Whereupon the Secretary of War made an order on July 23, 1901, amending

the former flow to permit an increase between four P. M. and twelve o'clock midnight "subject to revocation in case the increase was found to be *dangerous to navigation*". (M. R. 42.)

Again in the permit of December 5, 1901, the Secretary of War, in allowing a diversion of 250,000 cubic feet per minute, under conditions including:

> " * * * 3. That said Sanitary District of Chicago shall be responsible for all the *damage inflicted upon navigation interests* by reason of the increase in flow herein authorized." (M. R. 42.)

In the report of the Board of Engineers to Congress on December 18, 1905, it was stated:

> " * * * The capacity of that stream (Chicago River) at present, is such that not more than about 4,200 c.f.s. can pass without creating velocities which will unreasonably obstruct navigation. * * * " (M. R. 44.)

In the permit of June 30, 1910, the Secretary of War provided as a condition:

> " * * * (c) That the Sanitary District of Chicago must assume all responsibility for damages to property and navigation interests by reason of the introduction of a current in the Calumet as well as Chicago River. * * * ". (M. R. 60.)

In the report of the Chief of Engineers, February 28, 1912, upon the application of the Sanitary District for an increase at that time, it was stated:

> "that the current existing in the river was injurious to navigation, as shown by collisions between vessels and bridges and the difficulty of stemming the current." (M. R. 62.)

The case of Corrigan v. Sanitary District of Chicago, 125 Fed. 611, and 137 Fed. 851, illustrates the effect of this current in adversely affecting navigation upon the Chicago River as early as 1903, before the volume and increment of flow were increased to the present force and velocity. All of these conditions and statements by the War Department and its officers illustrate beyond question that this diversion is not for the purpose of benefiting navigation in the least, but has been purposely limited because it affected navigation in the Chicago River as well as the Great Lakes adversely.

IV. ANY POSSIBLE BENEFICIAL EFFECT UPON THE NAVIGATION OF THE MISSISSIPPI RIVER CAUSED BY THIS ABSTRACTION AT CHICAGO WAS NOT CONSIDERED NOR CONTEMPLATED BY THE SECRETARY OF WAR IN GRANTING THE PERMIT OF MARCH 3, 1925; THIS REASON SHOULD NOT BE EMPLOYED TO JUSTIFY THE PERMIT.

(Exceptions Nos. 13 and 22 relate to this subject.)

In Sanitary District vs. United States, 266 U. S. 405, 431, this Court said:

> "It is doubtful, at least, whether the Secretary was authorized to consider the remote interests of the Mississippi States or the Sanitary needs of Chicago."

Yet the Special Master says: (M. R. 124.)

> "My conclusion is that the diversion from Lake Michigan through the drainage canal increases to some extent during low water the navigable depths over bars on the Mississippi River, but that the extent of this increase is not the subject of sufficiently

> accurate determination to warrant a finding. Upon all the facts, it was permissible for the Secretary of War to reach the conclusion that the diversion from Lake Michigan of 8,500 c.f.s. was to some extent, an aid to the navigation of the Mississippi River in time of low water."

And again: (M. R. 125.)

> "It is not controverted that the Secretary of War had these considerations before him, on the application and hearing which resulted in the permit of March 3, 1925."

It is our position that this was not controverted because neither in the application by defendant, nor in the recommendation of the Chief of Engineers, the permit of the Secretary of War himself, nor in his letter of transmittal forwarding the permit of March 3, 1925, nor in fact is there an indication that such a consideration was either weighed by the Secretary of War or considered of the slightest moment in granting the permit.

The application of the Sanitary District of Chicago, January 31, 1925, was couched in this language:

> "The Sanitary District of Chicago hereby applies for permission to divert an annual average of 10,000 c.f.s. of water from Lake Michigan through the channel of the Sanitary District of Chicago for the purpose of preserving the lives and health of all of its people, and of the millions of others in constant daily contact with them." (J. R. 158.)

This not only demonstrates the purpose of the diversion, but covers every consideration deemed necessary to be shown to the Secretary of War upon the application. In the report of the Chief of Engineers which followed, there was not a single mention of any benefit to be derived by such diversion upon the Mississippi River. (M. R. 75,

76.) The Permit of March 3, 1925, from the Secretary of War, contained no indication of that claim, (M. R. 77-80) and the letter of transmittal (M. R. 80) not only contained no indication that the Mississippi River was a motivating consideration to any degree, but plainly stated that the permit was granted as a matter of supposed necessity for the disposal of the sewage of Chicago. Hence if it was not controverted that the Secretary of War had these considerations before him, it was because there was no proof of it and hence it was not necessary to establish that the Secretary of War did not consider any such claims in arriving at his finding.

But even if such consideration had been before the Secretary of War at the time of the hearing upon the application, it is evident from the testimony in the case and from even the language of the Special Master himself, that there is no evidence to support a finding that this diversion would materially increase navigable depths over bars on the Mississippi River. The testimony of General W. H. Bixby, United States Engineer, (M. R. 123) clearly answers the question as to the effect on the navigable capacity of the Mississippi River of a 10,000 c.f.s. diversion from Lake Michigan, by finding that it has no appreciable effect but might make a difference of a half a day in the time when the dredge starts work on the bars of that river and could have no effect whatsoever after the dredging has once started. As the stage of the Mississippi River rises, the bars also rise, and as these bars furnish the critical points in the periods of *low water*, there is no addition by reason of the Lake Michigan increment to the available depths for navigation over the bars. And at *high water* or flood stage (such as occurred in 1927) the only function of water from Lake Michigan would be to swell the flood by its added volume when it would be liable to cause untold damage to the lower

Illinois and Mississippi River states. "The Government reports state that the effect of the diversion of 10,000 c.f.s. at Chicago is to raise the mean stage of the Mississippi River one foot at St. Louis." (M. R. 122.) This flood of 1927 upon the Illinois and Mississippi Rivers illustrates how at *high water* stage these river valleys and their people are adversely affected by this diversion, which swells the flood-tide considerably at a time when human life and property are at stake.

How then—*at either low water* (when the bars interfere and form critical points) or at *high water* (when flood conditions demand *outlets* instead of *inflow*)—can it be claimed that the diversion of this water can be based *at all* upon *benefit* to *navigation upon the Mississippi River?*

V. THE FEASIBILITY OF REMEDIAL OR REGULATORY WORKS TO OFFSET THIS ABSTRACTION IS NOT AN ISSUE, AND IS NOT DETERMINATIVE OF COMPLAINANT'S RIGHTS; THIS SHOULD NOT HAVE BEEN CONSIDERED AS A BASIS FOR CONCLUSIONS BY THE SPECIAL MASTER.

(Exception No. 12 relates to this subject.)

The Special Master, as a part of his findings of fact concluded that remedial works were feasible to offset the effect of the Chicago Diversion. (M. R. 125-131.)

But the question is *not* how the damaging effect of the Chicago diversion can be *offset*, but whether there is an *obstruction to navigable capacity, and if so, whether there is any power and authority to continue it.*

While the Master specifically finds all the injuries to the commerce and property rights of the people of the

lake states, apparently he thinks that after their property is destroyed, Congress is under some obligation to remedy the damage by remedial works to offset the effect of this diversion. He sets forth the report of an "Engineering Board of Review" of 28 engineers in September, 1924, (M. R. 134, 135) which the State of Illinois and the Sanitary District employed for the purpose of finding some way to excuse their unlawful acts.

However, inasmuch as the feasibility of remedial works to offset the effect of the Chicago diversion has been found by the Special Master, there are certain definite considerations involved in the establishment of such regulating works.

1. The construction of such works is solely under the control of Congress and not under the control of the defendants nor of complainant, and when or if Congress will ever act on this matter is not known nor determined.

Gibbons v. Odgen, 9 Wheat 190;
Cooley v. Port Wardens, 12 How. 299;
Pennsylvania v. Wheeling Bridge Co. 13 How. 518.

2. The construction of such works is dependent on joint action and consent of Great Britain and the United States Government, and when or if the two governments will ever act and consent to the construction of such works is not known.

Under the terms of the Canadian Boundary Waters Treaty of January 11, 1909, (M. R. 52) the construction of such works as the Special Master proposes cannot be undertaken without the approval of the International Joint Commission.

Article 4 of the Treaty reads as follows:

"The High Contracting Parties agree that, except in case provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission."

Article 8 of the Treaty reads as follows:

"This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles 3 and 4 of this Treaty the approval of this Commission is required.

* * *

"The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

"In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby."

"The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavor to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a Protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement."

3. Complainant is not required to construct regulating works for the purpose of miligating damages caused by an illegal abstraction of water constituting a public nuisance done and created by defendants.

The effect of the Special Master's conclusion is to indicate that Complainant's rights should not be enforced against defendants, but must either abide favorable action by Congress and the Canadian government, or provide such regulating works at its own expense if the lake levels are to be preserved. Inasmuch as complainant can neither construct the works itself nor compel their construction by Congress and the Canadian Government, it certainly should not be denied relief against defendants on the ground that remedial works should be established which complainant is powerless to accomplish.

4. While some of the damages caused by this illegal abstraction from Lake Michigan might be mitigated by remedial works, some damages, such as those to water power and other rights, could never be compensated.

The Secretary of War in 1922, upon being consulted by the Committee on Rivers and Harbors, advised against the passage of a bill to permit the diversion of 10,000

c.f.s., and in his recommendation contained in a letter of February 2, 1922, said: (M. R. 72)

> "* * * In view of the substantial and widespread damage done to many activities throughout the United States by the diversion, *damage which can be but partly compensated by the construction of the works proposed in the bill*, the diversion should not be continued beyond the time when its necessity ceases to exist."

In the report of the Joint Board of Engineers, United States and Canada, of the St. Lawrence Waterway, November 16, 1926, (M. R. 129) in answer to question *6*(D) as to what works, if any, could be constructed to recover on the St. Lawrence River the amount of power lost by the diversion and what would be the cost of such works, replied: (J. R. 183)

> "244. Answer—The Board finds that if the St. Lawrence River has been fully developed for power production, *no works can be constructed which would recover on the St. Lawrence the power lost by the diversion of water from the watershed.*"

5. Even the establishment of remedial works would not justify an abstraction by Defendants from Lake Michigan.

The Complainant is entitled to the full benefit which might be obtained from the construction of compensating works by the Government without any mitigation or diminution by abstraction of water from Lake Michigan by defendants. The St. Lawrence River is navigable for ocean vessels as far as Montreal. When this great waterway is developed from the Lakes to the Atlantic Ocean so that ocean vessels may travel upon these great inland waterways to and from the Atlantic Ocean and drop

anchor in the improved ports of the State of Michigan, and other States, Complainant has the right as against defendants to have *all of the water* naturally belonging to this watershed *without abstraction* at Chicago, for the development and improvement of Great Lakes-St. Lawrence waterway to the Ocean.

VI. DEFENDANTS HAVE NOT COMPLIED WITH THE CONDITIONS OF THE PERMIT OF MARCH 3, 1925.

(Exceptions No. 2, 6 and 9 relate to this subject)

The Special Master says (M. R. 81):

> "It appears from the evidence that, *up to the time of the taking of the testimony herein*, the Sanitary District had *substantially complied* with the conditions of the permit."

The permit included the following conditions:

"1. That there shall be no unreasonable interference with navigation by the work herein authorized. * * *

3. That no attempt shall be made by the permitee or the owner to forbid the full and free use by the public of any navigable water of the United States. * * *

8. That if, within six months after the issuance of this permit, the city of Chicago does not adopt a program for metering at least ninety per cent of its water service and provide for the execution of said program at the average rate of one hundred per cent per annum thereafter, this permit may be revoked without notice. * * *

10. That this permit is revocable at the will of the Secretary of War and is subject to such action as may be taken by Congress."

1. Defendants have unreasonably interfered with navigation upon the Great Lakes and their connecting waters in violation of condition No. 1 of the permit of March 3, 1925.

The evidence conclusively establishes that the diversion of water from Lake Michigan has caused and continues to cause a lowering of levels and available depth of all the waters of the Great Lakes from St. Mary's Falls to tide water on the St. Lawrence River of approximately six inches, and particularly a lowering of at least six inches upon Lakes Huron and Michigan, which are dealt with as one reservoir of equal water level for all purposes in various reports by the War Department. The Special Master has found:

> (M. R. 104) "I find that the full effect of a diversion of 8,500 c.f.s. of water from Lake Michigan at Chicago through the drainage canal of the Sanitary District would be to lower the levels of Lakes Michigan and Huron approximately six inches at mean lake levels; the levels of Lakes Erie and Ontario approximately five inches at mean lake levels; and the levels of the connecting rivers, bays and harbors, so far as they have the same mean levels as the above mentioned lakes, to the same extent respectively."
>
> (M. R. 105) "I find that the diversion which has taken place through the Chicago drainage canal has been substantially equivalent to a diversion of about 8,500 c.f.s. for a period of time sufficient to cause, and has caused, the lowering of the mean levels of the lakes and the connecting water ways practically to the extent above stated.
>
> (M. R. 116) "I am satisfied that the evidence requires a finding that the lowering of the lake levels of approximately six inches *has had a substantial and injurious effect* upon the carrying capacity of vessels, and *has deprived navigation* and commercial

interests of the facilities which otherwise they would have enjoyed in commerce on the Great Lakes.

Thus the Special Master has found a substantial interference with navigation. If this does not constitute an "unreasonable interference with navigation" it is difficult to conceive how much more would be necessary to create such an interference as would constitute a violation of this condition of the permit. It is respectfully submitted that the first condition of this permit is an *express limitation* upon the authority which can be claimed under it, and that the permit cannot be asserted as authority for any act in violation of an express condition. Moreover, the condition qualifies the permit and determines its meaning to be substantially this: that defendants may divert water up to the maximum mentioned in the permit *provided* it does not constitute an obstruction to navigable capacity. When an obstruction to navigable capacity occurs this condition of the permit acts not only as an expression of limitation from the Secretary of War, but is an expression of the statutory limitation beyond which no authority exists without the affirmative act of Congress. This permit, *if valid* pursuant to statutory authority, must stand on the same basis as a statute of the United States. A violation of the provisions of the statute prohibiting obstructions to navigable capacity, would be actionable to prevent obstructions, even though the maximum diversion mentioned in the permit had not been reached.

Hence the first condition of the permit prohibiting "unreasonable interference with navigation," has been violated. It cannot be said in fact or in law that there has been a *substantial* compliance with the permit of March 3,

1925, in view of this violation of the first condition, incorporated in and made a part of that permit.

2. Defendants have exceeded the instantaneous maximum mentioned in the permit of March 3, 1925.

In the report of the District Engineer on application of the Sanitary District for the permit of March 3, 1925, a "diversion" was defined:

> (J. R. 170) "In other words, 'diversion' is taken to be the gross flow at Lockport, less the amount of water used by the City of Chicago for domestic purposes".

In the diplomatic correspondence between the Secretary of State of the United States and the Government of Canada, through the British Embassy, it was said: (J. R. 182)

> "The expression 'measured at the intakes', used to designate the places where the total actual flow should not exceed that specified in the permit, is hypothetical as it is impracticable to measure the diversion at the numerous intakes with accuracy. For this reason, the practical enforcement of the limitation placed upon the diversion will be carried out at Lockport. Measurements taken there will determine the gross diversion, sanitary and domestic, and, as accurate information is available in regard to the amount of water pumped by the City of Chicago for domestic purposes, the sanitary diversion may be computed by subtracting the domestic diversion from the gross flow at Lockport.
>
> "The term 'diversion' as used in the permit is construed to include the discharge of the Chicago and Calumet Rivers. In view of the methods employed in computing the amount of the diversion the discharge of these streams will be included within the

8,500 cubic feet per second, authorized by the permit of March 3, 1925."

It appears that this maximum diversion claimed to be authorized under the permit was exceeded on at least two occasions as follows: (J. R. 184)

November 16, 1925, 5 p. m. 13,415 c.f.s.
September 23, 1925, 4:30 p. m. 12,765 c.f.s.

Inasmuch as both of these tests occurred at a time when the peak-load of water-power development was occurring in the late afternoon, this fact also is significant in determining one of the purposes of this diversion. But upon at least these two occasions when tests were made the instantaneous maximum *has been exceeded.*

3. Defendants have not complied with metering requirements of the permit of March 3, 1925.

Condition number 8 of the permit provides for a program of metering of the water service of the City of Chicago. This clearly contemplates a *reduction* in the amount of water abstracted from Lake Michigan for domestic use by Chicago, which is not returned but used for additional dilution of sewage into and through the Sanitary Canal.

Since the closing of the taking of testimony in this case before the Special Master, it has become a matter of common knowledge through the public press, and otherwise, that the City of Chicago has wilfully and consciously abandoned and repudiated the program for water metering according to the requirements of condition number 8 of the permit, and has wilfully abandoned and terminated the reading of meters theretofore installed under the pro-

visions of this permit, and is not attempting to comply with either the program submitted by defendants to the War Department or the letter or spirit of condition 8 of the permit. Inasmuch as this has occurred since the taking of the testimony, it is of course a matter which the Special Master did not contemplate, for he said:

> "It appears from the evidence that, *up to the time of the taking of the testimony,* etc."

but it is a matter which we believe should be brought to the attention of this Court for such further consideration as warranted, and for reference by proof, or otherwise, as this Court may see fit.

Hence defendants are claiming to divert these waters from Lake Michigan under a permit which they themselves have violated. The effect of violation of these three conditions of the permit jointly and severally should render it void.

VII. THIS ABSTRACTION FROM LAKE MICHIGAN IS ALSO FOR WATER POWER DEVELOPMENT.

(Exceptions Nos. 1, 5, 11, 16, 18 and 21 relate to this subject)

On May 14, 1903, the State of Illinois passed an act relating to the development of water power by the Sanitary District which was the recognition of a powerful motive for the abstraction of the largest possible quantity of water from the Great Lakes. (J. R. 113.) From that time on the City of Chicago was not only interested in sewage disposal but became jointly interested with

the State of Illinois in the development of water power and the revenues to be derived therefrom.

Thereupon the State of Illinois decided to reverse its former policy stated in the constitution of Illinois of 1870, forbidding the appropriation of money or the loaning of credit in the aid of canals. But it will be noticed that this reversal of policy was limited to a single waterway in the State of Illinois and to that portion from which valuable water power could be developed if a large quantity of water were abstracted from Lake Michigan. In suggesting the reversal of the old policy, the Governor of that State pointed out in a message to the Legislature that by undertaking this work the State would derive a net annual income of $3,000,000 a year from electric power developed from the abstracted waters of Lake Michigan. (J. R. 115.)

Accordingly in 1908 the people of Illinois amended their Constitution so as to provide for the construction of what is called the Illinois Waterway, and the appropriation of the resultant water power development to the State of Illinois. (J. R. 115.) The Chief Engineer of the Illinois Waterway stated that in adopting this amendment the voters of Illinois were influenced by the prospect of obtaining a net annual income of $3,000,000 by the abstraction of water from Lake Michigan. (J. R. 120.)

June 17, 1919, the Legislature of Illinois passed the Illinois Waterway act providing for the appropriation of the water power from Lockport to Utica. (J. R. 116.) But the State of Illinois did not elect to improve this whole section of waterways so as to provide a connection between the Sanitary District Canal and the head of the federal improvement at LaSalle, Illinois. Instead, the section selected extended from Lockport to a point just

beyond the last available power site, a little above Utica and left an unimproved stretch of about seven miles from that point to the head of the said improvement, which would *prevent any through navigation.* (J .R. 116, 119, 121.) The Illinois Waterway commenced at the first available power site southwestward from Lake Michigan and ended at the last available power site and includes all available commercial power sites between Lake Michigan and the Mississippi River. (J. R. 117, 119.)

The United States Assistant Engineer stated that these power sites would be valuable if there were a large flow of water from Lake Michigan, but if the flow were limited to the quantity needed for lockage purposes, these power sites would not have any value. The measure of their value is the amount of water that can be taken from Lake Michigan. (J. R. 119.) The Chief Engineer of the Illinois Waterway stated that the power sites at Lockport and at Brandon Road would have no value if there were no diversion from Lake Michigan, except that amount actually used for navigation. (J. R. 122.)

The history of the manipulation of the amount abstracted from Lake Michigan also reflects the purpose of power development. The Assistant Chief Engineer for the Sanitary District stated that the records for a typical December day show that between four and five o'clock in the afternoon the flow at Lockport jumped from 269,000 cubic feet per minute to 589,000 cubic feet per minute, and the power produced from 9,900 k.w. to 21,600 kw. (J. R. 124.) At that particular time of day in December the day and night power load over-lapped. (J. R. 124.) This doubling of the flow in the late afternoon of each day varied with the season of the year, being dependent upon the time when the street lighting load came on in Chicago.

(J. R. 125.) This manipulation of flow for power purposes continued from 1908 until 1925 when the power plant of the Sanitary District was cross-connected with the Commonwealth Edison Company, on an exchange of power basis, and since that time a uniform flow has been maintained. (M. R. 26) (J. R. 124, 125.) The Secretary of War in his opinion of January 8, 1913, (M. R. 65) said:

> "It is manifest that so long as the City is permitted to increase the amount of water which it may take from the lakes, there will be a very strong temptation placed upon it to postpone a more scientific and possibly more expensive method of disposing of its sewage. *This is particularly true in view of the fact that by so doing it may still further diminish its expenses by utilizing the water diverted from the Lakes for water power at Lockport.*"

The Chief Engineer of the Illinois waterway stated that with the desired 10,000 c.f.s. abstraction from Lake Michigan, 34,800 horse power can be developed at Lockport, 72,600 horse power at the four state dams, and 11,500 horse power at the Marseilles dam, where private interests claim some right against the State. (J. R. 120.) That the four state dams would produce a net annual income of not less than $1,815,000 with a capitalized value at 4 per cent, of $37,875,000. (J. R. 120.) On the same basis the power site at Marseilles would produce an additional net annual income of $277,500 upon a capitalized value of over $7,000,000. (J. R. 120.) Including the income from the Lockport power site this would mean a net annual profit from the abstraction of the water of Lake Michigan to the State of Illinois for water power purposes alone of over $3,000,000. If the quantity of water were restricted to the needs of navigation these power sites

would have no value, the profits would disappear, and the city of Chicago and other cities in the metropolitan district would have to pay for their street lighting and other power uses. Can it be questioned that the attempt to obtain and retain this huge income from the abstraction of the waters of Lake Michigan is a powerful factor in defendant's demand for a large abstraction of water?

SUMMARY OF ARGUMENT ON THE LAW

I.

CONGRESS DOES NOT HAVE POWER TO AUTHORIZE AN ABSTRACTION OF WATER FOR AN UNCONSTITUTIONAL PURPOSE; THE DIVERSION OF THESE WATERS IS CLEARLY FOR SANITARY AND WATER POWER PURPOSES AND NOT FOR NAVIGATION; THE ATTEMPT TO EXERCISE POWER FOR THESE PURPOSES IS THEREFORE VOID.

1. The Constitutional limitation upon the power of Congress.

Article 1, Section 8, Clause 3, Federal Constitution.

Congress has only those powers which were delegated or granted by the people and expressly set forth in the Constitution.

> Martin v. Hunter, 1 Wheat. 304;
> United States v. Harris, 106 U. S. 629.

Congress may not legislate to affect navigation adversely.

> Grand Trunk Western Railway v. South Bend, 227 U. S. 544;
> United States v. River Rouge Improvement Co. 269 U. S. 411;
> Farnham on Waters, Vol. 1., page 60.

The Power of Congress over "commerce" does not contemplate its exercise for the purpose of sanitation, water power, irrigation or other non-navigation purpose.

Farnham on Waters, Vol. I., pages 59 and 60;
Port of Seattle v. Oregon & Washington Ry. Co. 255 U. S. 56.
United States v. Rio Grande, 174 U. S. 690;
Kansas v. Colorado, 206 U. S. 46;
United States v. River Rouge Improvement Co. 269 U. S. 411;
New Jersey v. Sargent, 269 U. S. 328;
Woodruff v. North Bloomfield Co. 18 Fed. 753;
Withers v. Buckley, 20 How. 84;
Mobile v. Kimball, 102 U. S. 698;
Depew v. Wabash, 5 Ind. 8;
Barney v. Keokuk, 94 U. S. 324;
Burlington Gas Light Co. v. Burlington, etc., Ry. Co. 165 U. S. 370;
Muhlker v. New York & Harlem Ry. Co., 197 U. S. 544;
Sauer v. City of New York, 206 U. S. 536.

2. *The diversion of these waters is for sanitary and water power purposes and not for the purpose of navigation or commerce so as to bring it within the power of Congress.*

Sanitary District v. United States, 266 U. S. 405;
Missouri v. Illinois, 180 U. S. 208, and also 200 U. S. 496.
Beidler v. Sanitary District, 211 Ill. 628;
Chicago v. Green, 238 Ill. 258;
Mortell v. Clark, 272 Ill. 201;
Sanitary District v. Chicago Packing Co. 241 Ill. Appl. 288.

Cases cited by Special Master distinguishable.

Miller v. Mayor, 109 U. S. 385;
New York v. New Jersey, 256 U. S. 296.

II.

THE DEFENDANTS HAVE CREATED AND ARE MAINTAINING AN OBSTRUCTION TO THE NAVIGABLE CAPACITY OF THE GREAT LAKES AND THEIR CONNECTING WATERS WITHOUT AUTHORITY FROM CONGRESS.

A. THIS ABSTRACTION CONSTITUTES AN OBSTRUCTION TO THE NAVIGABLE CAPACITY OF THE GREAT LAKES AND THE CHICAGO RIVER, BOTH IN FACT AND IN LAW.

Master's Report, pages 104-118

Inasmuch as this diversion creates an obstruction in fact it constitutes an obstruction in law to navigable capacity.

Sanitary District v. United States, 266 U. S. 405;
United States v. Rio Grande, 174 U. S. 690;
Economy Light and Power Co. v. United States, 256 U. S. 113;
United States v. Chandler-Dunbar Water Power Co. 229 U. S. 54;
Hubbard v. Fort, 188 Fed. 987.

B. CONGRESS HAS NOT ACTED TO "AFFIRMATIVELY AUTHORIZE" SUCH OBSTRUCTIONS, UNLESS SECTION 10 OF THE ACT OF MARCH 3, 1899, CAN BE SO INTERPRETED.

Report of Special Master, 173;
Sanitary District v. United States, 266 U. S. 405.

Statutes purporting to affirmatively authorize obstructions to navigation should be strictly construed.

Newport & Cincinnati Bridge Co. v. United States; 105 U. S. 470.
Fairbank v. United States, 181 U. S. 283.

C. UNDER SECTION 10 OF THE ACT OF MARCH 3, 1899, AN AFFIRMATIVE ACT OF CONGRESS WAS NECESSARY TO AUTHORIZE THE CREATION OF AN OBSTRUCTION TO NAVIGABLE CAPACITY; THIS SECTION DOES NOT AUTHORIZE THE SECRETARY OF WAR TO GRANT A PERMIT FOR THE ABSTRACTION OF THESE WATERS FROM THE GREAT LAKES.

Section 10 of the Act of March 3, 1899 (Chap. 425, Section 10, 30 Stat. at L. 1121-1151);
Sanitary District v. United States, 266 U. S. 405.

1. *Section 10 of the Act of March 3, 1899, should receive a construction which gives effect to its plain and unmistakable prohibition against obstructions to navigable capacity.*

Sanitary District v. United States, 266 U. S. 405.

A statute should receive a construction which gives effect to its unmistakable terms.

United States v. Goldenberg, 168 U. S. 95;
United States v. Lexington Mill Co. 232 U. S. 399;
Lake County v. Rollins, 130 U. S. 662;
Hamilton v. Rathbone, 175 U. S. 414;
Caminetti v. United States, 252 U. S. 485;
United States v. Wiltberger, 5 Wheat. 76;
American Railway Co. v. Birch, 224 U. S. 547;
United States v. Detroit First National Bank, 234 U. S. 245;
Adams Express Co. v. Kentucky, 238 U. S. 190.

The general construction of Section 10 is to prohibit the creation of obstructions and to necessitate regulations even though not amounting to an obstruction.

Hubbard v. Fort, 188 Fed. 987.

2. *Reference to the history of Section 10 of the Act of March 3, 1899, shows the plain intention of Congress to increase its prohibition against obstruc-*

tions to navigable capacity, so as to forbid such obstructions in any navigable waters of the United States, except by affirmative act of Congress.

Sanitary District v. United States, 266 U. S. 405;
United States v. Rio Grande, 174 U. S. 690;
United States v. Chandler Dunbar Co. 229 U. S. 53;
Lake Shore Railway Co. v. Ohio, 165 U. S. 365;
United States v. Bellingham Bay Boom Co. 176 U. S. 211.
Act of September 19, 1890 (Chap. 907, Sections 7 and 10, 26 Stat. at L. 426-454).

Instead of releasing its control Congress advanced its control over obstructions in all navigable waters.

Sanitary District v. United States, 266 U. S. 405;
United States v. Rio Grande, 174 U. S. 690;
United States v. Chandler-Dunbar Co., 229 U. S. 53;
Economy Light & Power Co. v. United States, 256 U. S. 113.

When Congress asserts its power to regulate commerce its authority is supreme in State waters.

United States v. Rio Grande, 174 U. S. 690;
Cummings v. Chicago, 188 U. S. 410;
Escanaba Transportation Co. v. Chicago, 107 U. S. 678;
Simpson v. Shepard, 230 U. S. 350.

3. *By the language "obstruction to navigable capacity" in section 10, Congress intended to prohibit this kind of an abstraction of water.*

United States v. Rio Grande Dam & Irr. Co. 174 U. S. 690;
Economy Light & Power Co. v. United States, 256 U. S. 113;
United States v. Chandler-Dunbar Water Co. 229 U. S. 54;
Sanitary District v. United States, 266 U. S. 405;
Hubbard v. Fort, 188 Fed. 987;

Anything which tends to destroy the navigable capacity of one of the navigable waters of the United States is within the terms of the prohibition.

United States v. Rio Grande Dam & Irr. Co. 174 U. S. 690.

4. *By the use of the language "affirmatively authorized" Congress contemplated retention of control over obstructions to navigable capacity and not a delegation of power to the Secretary of War; a positive prohibition is not an affirmative authorization.*

Hubbard v. Fort, 188 Fed. 987.

5. *Under section 10 an affirmative act of Congress is necessary as a condition precedent to the existence of any power in the Secretary of War to authorize obstructions to navigable capacity.*

Hubbard v. Fort, 188 Fed. 987;
Pennsylvania v. Wheeling Bridge Co. 13 How. 518;
West Chicago Street Ry. Co. v. Illinois, 201 U. S. 506;
Cobb v. Lincoln Park Comm. 202 Ill. 427;
Wilson v. Hudson County Water Co. 76 N. J. Eq. 543.

6. *Obstructions to navigable capacity of interstate waters without authority from Congress have always been unlawful; when an obstruction to navigation exists in fact in inter-state waters, congress alone may authorize its continuance but only by an affirmative act.*

Pennsylvania v. Wheeling Bridge Co. 13 How. 518;
Bridge Company v. United States, 105 U. S. 470;
Miller v. Mayor of New York, 109 U. S. 385;
Gibbons v. Ogden, 9 Wheat. 190;
Sault Ste. Marie v. International Transit Co. 234 U. S. 333;
Cooley v. Port Wardens, 12 How. 299.

Where Congress has not authorized an obstruction to navigable capacity in interstate waters this court has assumed jurisdiction to enjoin.

Pennsylvania v. Wheeling Bridge Co. 13 How. 518; 18 How. 421;
Economy Light & Power Co. v. United States, 256 U. S. 113.

7. *It would be an unconstitutional application of section 10 of the Act of March 3, 1899, to construe this section as delegating authority to the Secretary of War to permit diversion of these waters from Lake Michigan for purposes of sanitation or to "affect navigation adversely".*

Port of Seattle v. Oregon & Wash. Ry. Co. 255 U. S. 56;
Kansas v. Colorado, 206 U. S. 46;
United States v. River Rouge Imp. Co. 269 U. S. 411;
Sanitary District v. United States, 266 U. S. 405.

8. *The language of section 10 of the Act of March 3, 1899, is not susceptible of construction by reference to the so-called rules in aid of construction used by the Special Master.*

a. *The rule of ambiguity is not applicable here.*

Report of the Special Master, p. 184;
Sanitary District v. United States, 266 U. S. 405.

When the language of the statute is plain and unambiguous the statute must be given its plain meaning.

United States v. Wiltberger, 5 Wheat 76;
United States v. Detroit First National Bank, 234 U. S. 245;
Adams Express Company v. Kentucky, 238 U. S. 190;
United States v. Fisher, 2 Cranch 358;
Merrit v. Welch, 104 U. S. 694;
United States v. Dickson, 15 Pet. 141;
Amy v. Watertown, 130 U. S. 320;
United States v. Rider, 163 U. S. 132.

b. The rule of construction based upon the practice of the War Department in administering section 10 is not applicable because the practice of that Department has not been uniform, but has been constantly in doubt from the beginning, even to the extent exercised.

United States v. Healey, 160 U. S. 136;
Wisconsin Central v. United States, 164 U. S. 205;
United States v. Johnson, 173 U. S. 378;
Houghton v. Payne, 194 U. S. 88;
United States v. Graham, 110 U. S. 219;
United States v. Finnel, 185 U. S. 236;
Edwards' Lessee v. Darby, 12 Wheat. 206;
United States v. Temple, 105 U. S. 97;
Swift Co. v. United States, 105 U. S. 691;
Ruggles v. Illinois, 108 U. S. 526.

c. The decision of this court in Sanitary District v. United States does not construe or interpret section 10 as delegating power to the Secretary of War to affirmatively authorize an obstruction to the navigable capacity of the Great Lakes.

Report of Special Master, p. 189;
Sanitary District v. United States, 266 U. S. 405.

d. The fact that Congress did not act to disapprove the Secretary of War's permit of March 3, 1925, does not constitute an "affirmative act of Congress" nor a delegation of power by implication; legislative power cannot be implied so as to be exercised by another department of government.

Report of Special Master, p. 186, 187;
Kilbourn v. Thompson, 103 U. S. 168;

When express ratification is asked and refused no power can be implied nor inferred.

Barden v. Northern Pacific, 154 U. S. 288;
Durosseau v. United States, 6 Cranch, 307;
Eyster v. Centennial Board of Finance, 94 U. S. 500.

Implied power from non-action of Congress is limited to a withdrawal of public lands or similar concerns in pursuance of a policy declared by Congress or in cases where grants of Congress were in conflict.

United States v. Midwest Oil Co. 236 U. S. 459; (dissenting opinion).

e. Affirmative authorization cannot be implied from section 10 by supplying and reading into that section the word "unreasonable" so as to modify the express prohibition against obstructions to navigable capacity.

Report of Special Master, p. 190;
Fairbank v. United States, 181 U. S. 283;
Section 18 of the Act of March 3, 1899 (30 State, at Lar. 1121, 1153, Chap. 425, Sec. 18).

It is a general principle of interpretation that the mention of one thing implies the exclusion of another.

United States v. Arredando, 6 Pet. 691;
Sturgis v. Draper, 12 Wall. 19;
Arthur v. Cunning, 91 U. S. 362;
Walla Walla v. Walla Walla Water Company, 172 U. S. 1.

To depart from the meaning expressed in section 10 would be to legislate and not to interpret.

United States v. Detroit First National Bank, 234 U. S. 245;
United States v. Goldenburg, 168 U. S. 97;
United States v. Lexington Mill Co. 232 U. S. 399.

f. Section 10 of the Act of March 3, 1899, is not in and of itself an affirmative act of Congress delegating authority to the Secretary of War in cases under the second and third clauses of that section. This statute operates prospectively.

Report of Special Master, p. 182;
United States v. Wishka Boom Co. 136 Fed. 42.

There is always a presumption that statutes are intended to operate prospectively only.

Reynolds v. M'Arthur, 2 Pet. 417;
Twenty Percent cases, 20 Wall. 179;
Cameron v. United States, 231 U. S. 710;
United States Fidelity, etc. v. United States, 209 U. S. 306.

g. The Maine Water Company case is distinguishable.

Maine Water Co. vs. Knickerbocker Steam Towage Company, 99 Me. 473;
Hubbard v. Fort, 188 Fed. 987;
Sanitary District v. United States, 266 U. S. 405;

h. Section 10 should not receive a construction delegating discretionary power to the Secretary of War to authorize obstructions to navigable capacity, because such power necessarily includes the power of eminent domain which cannot be delegated unless it affirmatively appears from action by Congress.

Monongahela Navigation Co. v. U. S. 148 U. S. 312;
Southern Pacific Co. v. Olympian Dredging Co. 260 U. S. 205;
Scranton v. Wheeler, 179 U. S. 141;
United States v. Lynah, 188 U. S. 445;
United States v. Cress, 243 U. S. 316;
2 Suth. on Stat. Const. 2d ed. 1940;
20 Corpus Juris 533;
United States v. Gettysburg Electric Co. 166 U. S. 668;
Newport & Cincinnati Bridge Co. v. United States. 105 U. S. 470;
Fairbank v. United States, 181 U. S. 283;
Western Union v. Atlanta, 227 Fed. 465;
Western Union v. Penn. Rd. Co. 195 U. S. 540;
United States v. Rauers, 70 Fed. 748;
Washington Water Power Co. v. Waters, 186 Fed. 572;
Miocene Ditch Co. v. Lyng, 138 Fed. 544.

9. *The ordinance of 1787 prohibits interference with the navigable capacity of the Great Lakes; Congress did not intend section 10 to modify or repeal the prohibition of this compact.*

Ordinance of 1787 (1 Stat. at L. 51, 52; United States Rev. Stat. 1878 ed. pp. 13, 16)
Pennsylvania v. Wheeling Bridge Co. 13 How. 518;
Economy Light and Power Co. v. United States, 256 U. S. 113;

Repeals by implication are not favored and will not be indulged in if there is any other reasonable construction.

Lewis v. United States, 244 U. S. 134;
Washington v. Miller, 235 U. S. 422;
Ex parte Webb, 255 U. S. 663.

One act cannot be allowed to defeat another if by fair construction both can stand together.

Washington v. Miller, 235 U. S. 422.

An intention to repeal salutary provisions in an earlier statute cannot be implied.

Fussell v. Gregg, 133 U. S. 550.

Where two statutes are inconsistent the presumption is that the special act is intended to remain in force as an exception to the general act.

Rodgers v. United States, 185 U. S. 83;
Washington v. Miller, 235 U. S. 422;
In Re Louisville Underwriters, 134 U. S. 488.

10. *To construe section 10 as giving the Secretary of War full authority to authorize this diversion without an affirmative act of Congress is not justified in light of international relationship with Canada, including treaties and kindred acts of Congress.*

Article II, Section 2, Clause 2, Federal Constitution;

Article VI, Section 2, Federal Constitution;
United States v. Rio Grande Dam & Irr. Co. 174 U. S. 690;
Kansas v. Colorado, 206 U. S. 46;
Sanitary District v. United States, 266 U. S. 405;
United States v. Chandler-Dunbar Water Co. 229 U. S. 54.

a. Canada has a right to its portion of international waterways.

Vattel Law of Nations, Introd. par. 18;
In Re The Antelope, 10 Wheat. 66;
In Re The Schooner Exchange v. M'Fadden, 7 Cranch, 116;
Kansas City Southern v. Kaw Valley Drainage Dist. 233 U. S. 75.

b. The Canadian Boundary Waters Treaty of 1909 did not contemplate authorization to make abstractions affecting international waters.

Canadian Boundary Waters Treaty of Jan 11th, 1909;
Article II. Section 2, Clause 2, Federal Constitution;
Sanitary District v. United States, 266 U. S. 405.

c. The Treaty of 1909 bears the same construction as should be given to section 10.

The Canadian Boundary Waters Treaty of 1909;
Section 10 of the Act of March 3, 1899.

d. The Niagara Falls Act does not contemplate extensive delegated powers to the Secretary of War.

Niagara Falls Act of June 29, 1906.

e. A general consideration of American-Canadian relationships does not justify such a construction of section 10 as to authorize obstructions in international waters.

Lord v. Steamship Co. 102 U. S. 541;

Henderson v. Mayor of New York, 92 U. S. 259;
United States v. Chandler-Dunbar Water Co. 229 U. S. 53.

11. *To construe section 10 as delegating power to the Secretary of War to grant express authority for obstructions to navigable capacity would render that section void, because such a construction would amount to an unconstitutional delegation of legislative power.*

a. Congress, having established the rule of law prohibiting obstructions, authorization to defendants would amount to a change in the general rule and not a fact-finding determination.

St. Louis Merchants Bridge Co. v. United States, 188 Fed. 191;

Power to regulate commerce cannot be delegated.

Hautenberg v. Hennick, 129 U. S. 148;
Robbins v. Shelby Co. 120 U. S. 489;
Asher v. Texas, 128 U. S. 129;
Dent v. United States, 71 Pac. Rep. 920;
United States v. Blasingame, 116 Fed. 654.

The so-called bridge cases are distinguishable.

Union Bridge Co. v. United States, 204 U. S. 364.

b. Any construction of section 10 conferring legislative power would be void.

United States v. Chandler-Dunbar Co. 229 U. S. 53;
Southern Pacific v. Olympian Co. 260 U. S. 205;
Monongahela Bridge Co. v. United States, 216 U. S. 177;
Philadelphia Co. v. Stimson, 223 U. S. 605;
Scranton v. Wheeler, 179 U. S. 141;
West Chicago Street Ry. Co. v. Chicago, 201 U. S. 506.

12. *The permit of March 3, 1925, from the Secretary of War does not justify the abstraction of these waters from Lake Michigan by defendants as against the State of Michigan.*

a. *This permit is but an expression of assent.*

Cummings v. Chicago, 188 U. S. 410;
Montgomery v. Portland, 190 U. S. 89.

b. *Being but a revocable license this permit cannot justify the invasion of property rights.*

Sanitary District v. United States, 266 U. S. 405;
Corrigan Transportation Co. v. Sanitary Dist. 125 Fed. 611;
Baltimore & Potomac v. Baptist Church, 108 U. S. 317;
Hubbard v. Fort, 188 Fed. 987;
Wilson v. Hudson Co. Water Co. 76 N. J. Eq. 543;
Cobb v. Comm. of Lincoln Park, 202 Ill. 427;
Attorney General ex rel Becker v. Bay Boom Co. 172 Wis. 363;
International Bridge Co. v. New York, 254 U. S. 126;
In Re Crawford County L. & D. Dist. 182 Wis. 404;
Commonwealth v. Pennsylvania Ry. 72 Penn. Super. Ct. 353.

III.

THE DIVERSION AND ABSTRACTION OF WATERS FROM LAKE MICHIGAN BY DEFENDANTS CONSTITUTES A TAKING OF COMPLAINANTS PROPERTY WITHOUT JUST COMPENSATION, IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS OF THE FEDERAL CONSTITUTION.

1. *The exercise of power by Congress over navigation is subject to the limitation of the 5th amendment.*

Gibbons v. Ogden, 9 Wheat. 1, 196;

Cooley v. Port Wardens, 12 How. 310;
Councilmen v. Hitchcock, 142 U. S. 547;
Interstate Commerce Comm. v. Brimstone, 154 U. S. 447;
Dooley Case, 188 U. S. 321;
O'Neil v. Vermont, 144 U. S. 323;
Potapsco Guano Company v. N. Carolina, 171 U. S. 345.

The constitutional limitation upon the exercise of the power of Congress over navigation requires *just compensation.*

Monongahela Navigation Co. v. United States, 148 U. S. 312;
Scranton v. Wheeler, 179 U. S. 141;
United States v. Lynah, 188 U. S. 445;
United States v. Cress, 243 U. S. 316.

2. The State of Michigan has a quasi sovereign right over the land and water of the Great Lakes and their connecting rivers within its boundaries, and also as sovereign is the parens patriae.

a. By treaty of peace Great Britain surrendered all rights to land and water within the United States.

Johnson v. McIntosh, 8 Wheat. 543;
Manchester v. Commonwealth of Mass. 139 U. S. 266;
Martin v. Waddell, 16 Pet. 367;
Shively v. Bowlby, 152 U. S. 1;
Wheeler v. Smith, 9 How. 55.

b. Upon admission into the Union Michigan succeeded to all these rights.

1. All states are admitted upon an equal footing.

a. By settled principle.

1 Nichols on Eminent Domain, par. 7;
Pollard v. Hagan, 44 U. S. 212;
Munn v. Illinois, 94 U. S. 113;

Shively v. Bowlby, 152 U. S. 1;
Hardin v. Shedd, 190 U. S. 508;
Kansas v. Colorado, 206 U. S. 46;
Port of Seattle v. Oregon & Wash. Ry. Co. 255 U. S. 56;

b. By the ordinance of 1787.

Section 2 of the Act of Congress approved June 15, 1836 (admitting the State of Michigan into the Union).

5. Sovereign states own all of the land and waters within their boundaries as against any other state.

Davis International Law, Par. 13;
15 Ruling Case Law, p. 100.
Taylor International Law, Chap. III, p. 263;
1 Halleck, International Law, Chap. VI., Par. 13;
Hall, International Law, 5th ed., Chap. 11, p. 100;
Glenn, International Law, Par. 34, p. 45;
Wheaton, International Law, Chap. IV., p. 217;
1 Hyde, International Law, p. 272;
Wilson, International Law, p. 78;
1 Oppenheim, International Law, 3d Ed. Par. 172;
Vattel, Law of Nations, Book II, Chap. VII;
Am. & Eng. Ency. of Law, 2nd Ed. 1133;
1 Cooley, Constitutional Limitations, 8th Ed. p. 4;
Church v. Hubbart, 2 Cranch, 187, 234; 2 L. Ed. 249, 264;
United States v. Smiley, et al, 27 Fed. Cases 1132, Case No. 16317;
In the Paquete Habana, 175 U. S. 679; 44 L. Ed. 321;
Mayor of New York v. Miln, 11 Pet. 102, 139; 9 L. Ed. 648;
Hudson County Water Co. v. McCarter, 209 U. S. 349; 52 L. Ed. 828;
33 Corpus Juris, 404;
Georgia v. Tenn. Copper Co. 206 U. S. 230; 51 L. Ed. 1038;
No. Dakota v. Minnesota, 263 U. S. 342; 68 L. Ed. 365.

4. *The State of Michigan has proprietary rights as a riparian owner in the land and waters within its boundaries.*

a. The State of Michigan has the authority to determine for itself such rules of property as it shall deem expedient with respect to waters within its boundaries, both navigable and non-navigable, and the ownership of the lands forming their beds and banks.

Hardin v. Jordan, 140 U. S. 384;
Shively v. Bowlby, 152 U. S. 1;
Scott v. Lattig, 227 U. S. 229;
Archer v. Greenville Sand & Gravel Co., 233, U. S. 60;
Port of Seattle v. Oregon & Wash. Ry. Co. 225 U. S. 56;
United States v. Holt State Bank, 270 U. S. 49;
Appleby v. New York, 271 U. S. 365;
Barney v. Keokuk 94 U. S. 324;
United States v. Cress, 243 U. S. 316.

b. The State of Michigan has established the rule that the State is the proprietary owner of the waters of the Great Lakes within its boundaries and of the lands forming their beds and banks.

1. *In Michigan the title to riparian property outside the meander line on the Great Lakes is held in trust by the State for the use of its citizens.*

Ainsworth v. Munoskong Hunting and Fishing Club, 159 Mich. 61;
State v. Venice of America Land Co. 160 Mich. 680;
Kavanaugh v. Rabior, 222 Mich. 68;
Kavanaugh v. Baird, 241 U. S. 240 (Decided January 3, 1928).

2. *The State of Michigan has a right of dockage upon the Great Lakes and connecting waters, as riparian owner and also as representative of its people.*

Transport Company v. Parkersburg, 107 U. S. 707;

Dutton v. Strong, 66 U. S. 23;
Yates v. Milwaukee, 10 Wall. 497;
Rice v. Ruddiman, 10 Mich. 125;
Richardson v. Prentiss, 48 Mich. 88;
Lincoln v. Davis, 53 Mich. 375;
Blodgett & Davis Lumber Co. v. Peters, 87 Mich. 498;
People v. Silberwood, 110 Mich. 103;
Commissioner of Highways v. Ludwick, 154 Mich. 32;
Walker v. Shepardson, 4 Wis. 486;
Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214;
Madison v. Mayers, 97 Wis. 399;
Miller v. Mendenhall, 43 Minn. 95;
Mobile Drydock v. Mobile, 146 Ala. 198;
Ladies Seamen' Friends Society v. Halstead, 59 Conn. 144;
Norfolk City v. Cook, 27 Gratt. 430;
Alexandria & F. R. Co. v. Faunce, 31 Gratt. 761;
Buffalo v. Delaware L. & W. R. Co. 39 N. Y. Supp. 4;
Saunders v. New York Central & H. RR. Co., 54 N. Y. Supp. 364;
Deering v. Proprietors of Long Wharf, 25 Maine 51;
Mather v. Chapman, 40 Conn. 382;
Commonwealth v. Pierce, 2 Dane Abr. 696;
Clement v. Burns, 43 New Hampshire, 618;
Hill v. Gough, 23 N. J. 624;
New Jersey Zinc Co. v. Morris Canal, 44 N. J. Eq. 398.

3. *A different rule prevails in the State of Michigan as to the rights of riparian proprietors upon navigable rivers.*

Lorman v. Benson, 8 Mich. 18;
Rice v. Ruddiman, 10 Mich. 128;
Ryan v. Brown, 18 Mich. 186;
Watson v. Peters, 26 Mich. 508;
Bay City Gas Light Co. v. Industrial Works, 28 Mich. 182;
Maxwell v. Bay City Bridge Co. 41 Mich. 46;
Pere Marquette Boom Co. v. Adams, 44 Mich 403;

Richardson v. Prentiss, 48 Mich. 88;
Backus v. Detroit, 49 Mich. 110;
Fletcher v. Thunder Bay Co. 51 Mich. 277;
Webber v. P. M. Boom Co. 62 Mich. 636;
Butler v. Railroad Co. 85 Mich. 255;
Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co. 102 Mich. 227;
People v. Silberwood, 110 Mich. 106;
Scanton v. Wheeler, 113 Mich. 565;
Goff v. Gougle, 118 Mich. 307;
Brown v. Parker, 127 Mich. 392;
Kemp v. Stradley, 134 Mich. 676;
People v. Grand Rapids Power Co. 164 Mich. 121;
Nedtweg v. Wallace, 237 Mich. 14;
Collins v. Gearhart, 237 Mich. 38;
Kavanaugh v. Baird, 241 Mich. 240.

5. *These rights as quasi-sovereign, parens patriae and as a proprietory owner are property rights of the State of Michigan and its people in the land and waters within its boundaries upon the Great Lakes and their connecting waters.*

a. *Property in its legal conception.*

Buchanan v. Warley, 245 U. S. 71;
Rice v. Ruddiman, 10 Mich. 145;
Grand Rapids Boom Co. v. Jarvis, 30 Mich. 308;
Hall v. Ionia, 38 Mich. 493;
Eaton v. Boston, Concord & Montreal RR. Co. 51 New Hampshire, 504;
1 Lewis Eminent Domain, 3d Ed. par. 63;
12 Corpus Juris, 945;
Old Colony & Fall River Ry. Co. v. County of Plymouth, 14 Gray 155;
Fisher v. Bountiful City, 21 Utah, 29;
City of St. Louis v. Hill, 116 Mo. 527;
City of Denver v. Bayer, 7 Col. 113;
Chicago & Western Indiana RR. v. Englewood Connecting RR. Co. 115 Ill. 375;
Bailey v. People, 190 Ill. 28.

b. The State of Michigan as sovereign, as the parens patriae and also in its proprietary capacity has definite property rights in the waters of Lake Michigan, its beds and banks.

1. *The State of Michigan is entitled to have all the waters coming naturally to it, yielding only if at all to the demand of public, commercial necessity as asserted by appropriate Congressional action.*

Gardner v. Newburgh, 2 Johnson's Chancery, 165;
Kansas v. Colorado, 206 U. S. 46;
Hudson County Water Co. v. McCarter, 209 U. S. 349;
United States v. Rio Grande, 174 U. S. 690;
Missouri v. Illinois, 180 U. S. 208;
United States v. Chandler-Dunbar Water Co. 229 U. S. 54;
Hoge v. Eaton, 135 Fed. 411, 414;
Holyoke Water Power Co. v. Connecticut River Company, 20 Fed. 71;
Pine v. New York, 112 Fed. 98;
United States v. River Rouge Improvement Co. 269 U. S. 411;
Gould on Waters, 2d ed. 396;
Rigney v. Tacoma Electric Light & Water Co. 9 Wash. 576;
Crawford County v. Hathaway, 67 Neb. 325, 340; 93 N. W. 788;
Ohio & Mississippi Ry. Co. v. Thillman, 143 Ill. 127;
Wyoming v. Colorado, 259 U. S. 419, 466.
Farnham on Waters (1904) Vol. I, pages 29, 59;
Tetherington v. Donk Bros. 232 Ill. 522;
Thomas v. Coal Co. 199 Ill. App. 50, 58;
Hyatt v. Albro, 121 Mich. 638;
Embrey v. Owen, 6 Exchn. 353;
3 Kent Comm. 439;
1 Wiel Water Rights, 1911, 3d Ed. Sec. 282, 285, 711.

6. *This diversion of water by the State of Illinois and the Sanitary District of Chicago amounts to a taking of the property of the State of Michigan.*

a. *Taking in its legal conception.*

The general rule is that any injury to rights or property which, if caused by a private person without authority of

statute would give the plaintiff a cause of action against such person, constitutes a taking of property, entitling one to compensation, notwithstanding the statute which legalizes the damaging work.

Delaplaine v. Chicago & N. W. R. R. Co., 42 Wis. 214;
1 Mills on Eminent Domain, Par. 183;
Trinity Sabine R. Co. v. Meadows, 73 Texas, 32, 3 L. R. A. 565;
Gould on Waters, (2d Ed.) p. 497;
Peel v. The City of Atlanta, 85 Ga. 138; 8 L. R. A. 787;
1 Lewis Eminent Domain, 3rd. Ed. Par. 65;
1 Nichols on Eminent Domain, Par. 28;
Avery v. Fox, 2 Fed. Cases, Case No. 674;
Central Trust Co. of New York v. Hennen, 90 Fed. Rep. 593;
James v. Campbell, 104 U. S. 359; 26 L. Ed. 786;
Johnson v. United States, 4 Court of Claims, 250;
Eaton v. Boston, Concord & Montreal Rd. Co., 51 N. H. 504; 12 Am. Rep. 147;
Cooley's Constitutional Limitations, 8th Ed. 1158;
Foster v. The Stafford National Bank, 57 Vt. 128;
City of Mansfield v. Balliett, 65 Ohio St. 451; 58 L. R. A. 628;
Broadwell v. The City of Kansas, 75 Miss. 213.
People ex rel. The Manhattan Savings Institution of the City of New York v. Norton P. Otis, et al., 90 N. Y. 48;
McCord v. High, 24 Iowa, 336;
Memphis & Charleston Railroad Co. v. Birmingham, Sheffield & Tennessee River R. Co., 96 Ala. 571; 18 L. R. A. 166;
City of Schnectady v. Furman, 145 N. Y. 482;
Gaylord v. The Sanitary District of Chicago, 204 Ill. 576; 63 L. R. A. 582; 98 Am. St. Rep. 235;
City of Clinton v. Franklin, 119 Ky. 143;
Oregon Short Line Railroad Company v. Jones et al., 29 Utah, 147;

Leffman v. Long Island Ry. Co., 93 N. Y. Supp. 647;
Knowles v. New Sweden Irrigation Dist. 16 Idaho 217;
School Town of Andrews v. Heiney, 178 Ind. 1.

b. It is not necessary that the property be absolutely and physically taken from the possession of the complaining party, and the complaining party ejected from possession and use.

1. If water is dammed up or set back upon or over land so as to destroy its essential use, it constitutes a taking of property.

Pumpelly v. Green Bay & Mississippi Canal Co., 13 Wall. 166; 20 L. Ed. 557;
United States v. Lynah, 188 U. S. 445; 47 L. Ed. 539;
United States v. Cress, 243 U. S. 316; 61 L. Ed. 746;
King v. United States, 59 Fed. Rep. 9;
Williams et al. v. United States, 104 Fed. Rep. 50;
Morris v. The United States, 30 Ct. of Claims, 162;
Jackson et al. v. The United States, 31 Ct. of Claims, 318;
Stevens v. The Proprietors of the Middlesex Canal, 12 Mass. 466;
Evansville & Crawfordsville Rd. Co. v. Dick, 9 Ind. 433;
Kemper and wife v. City of Louisville, 77 Ky. 87;
Conniff v. The City & County of San Francisco, 67 Calif. 49;
Nevins v. City of Peoria, 41 Ill. 502;
Beidler et al. v. The Sanitary District of Chicago, 211 Ill. 628;
Doty v. Village of Johnson, 84 Vermont 15;
Ft. Worth Improvement District No. 1 v. City of Ft. Worth, 106 Tex. 148; 158 S. W. 164; 48 L. R. A. (N. S.) 994.

2. *If a riparian owner is deprived of the use and ordinary flow of water in its natural and normal height by artificial lowering of levels so as to convert what was water area into land area, it constitutes a taking of property.*

Cohen v. United States, 162 Fed. Rep. 364;
United States v. Alexander et al., 148 U. S. 190;
Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453;
Meyers v. City of St. Louis, 8 Missouri Appeals, 266;
City of Emporia v. Soden, 25 Kansas 588; 37 Am. Dec. 265;
Mayor and City Council of Baltimore v. Warren Manfg. Co. et al., 59 Maryland 96;
Smith v. Rochester, 92 N. Y. 463; 44 Am. Rep. 393;
Proprietors of Mills and others v. Braintree Water Supply Co., 149 Mass. 478;
Fernald v. Knox Woolen Co., 82 Maine 48, 7 L. R. A. 459;
Kimberly & Clark Co. v. Hewitt and others, 75 Wis. 371;
Kimberly & Clark Co. v. Hewitt, et al., 79 Wis. 334;
Cedar Lake Hotel Company v. City of Fall River, 154 Mass. 305;
Rigney v. Tacoma Light & Water Company, 9 Wash. 576;
Waller v. State of New York and Skaneateles Paper Co. v. State of New York, 144 N. Y. 579;
Valparaiso City Water Co. v. Dickover, 17 Ind. App. Ct. Rep. 233;
Priewe v. Wisconsin State Land & Improvement Co., 93 Wis. 534, 33 L. R A. 645;
Smith v. Youmans, 95 Wis. 103; 70 N. W. 1115;
Gehlen Brothers v. Knorr, 101 Iowa 700; 36 L R. A. 798;
Neal v. City of Rochester, 156 N. Y. 213;
Baxter v. Gilbert, 125 Calif. 580;
Hyatt v. Albro, 121 Mich. 638;
Sanborn v. People's Ice Co , 82 Minn. 43, 83 Am. St. Rep. 401, 84 N. W. 641, 51 L. R A. 829;

Strobel v. Kerr Salt Co, 164 N. Y. 303, 79 Am. St. Rep. 643; 51 L. R. A. 687;
New Whatcom v. Fairhaven Land Co., 24 Wash. 493; 54 L. R. A. 190;
Draper v. Brown, 115 Wis. 361, 91 N. W 1061;
People v. Hulbert, 131 Mich. 156;
Wender v. Spokane County, 27 Wash. 121;
Webster v. Harris, 111 Tenn 668, 59 L. R. A. 324.

7. This diversion of water from Lake Michigan is not governed by the authorities cited by the Special Master; this diversion is not an "incidental damage" nor is it damnum absque injuria.

a. In each of the cases cited by the Special Master the work was for a constitutional purpose. It was authorized by an Act of Congress and it was done by or for the Federal Government.

The following cases are distinguishable:

S. Carolina v. Georgia, 93 U. S. 4;
Gibson v. United States, 166 U. S 269;
Scranton v. Wheeler, 179 U. S. 141;
C. B. & Q. v. Illinois, 200 U S. 561;
W. Chicago Street Ry. Co. v. Illinois, 201 U. S 506;
Union Bridge Co. v. United States, 204 U. S. 364;
Philadelphia Co v. Stimson, 223 U. S. 605;
Chandler-Dunbar Water Co. v. United States, 229 U. S. 53;
Jackson v. United States, 230 U. S. 1;
Greenleaf-Johnson v. Garrison, 237 U. S. 251;
Willink v. United States, 240 U. S. 572;
Horstman Company v. United States, 257 U. S. 138;
United States v. River Rouge Improvement Co., 269 U. S. 411.

These cases are also distinguished by United States v. Cress, 243 U. S. 316.

b. In each of these cases cited by the Special Master the work caused an "incidental damage."

Sanguinetti v. United States, 264 U. S. 146; is distinguishable

United States v. Rio Grande Dam & Irrigation Company, 174 U. S. 690;
Hubbard v. Fort, 188 Fed. 987.

ARGUMENT ON THE LAW

The Special Master, having determined the facts in substantial accord with complainant, it is our position that the defendants are not clothed with constitutional and Congressional authority to abstract the water of Lake Michigan to the substantial damage and destruction of the property of the State of Michigan and its people.

Issues of Law.

The Special Master has found:

1. That this suit is one over which this court has jurisdiction and that it presents a justiciable controversy. (MR144-146.)
2. That an act of Congress is necessary to justify this abstraction and diversion. (MR146-148.)
3. That Congress has not acted to permit this diversion, unless the Rivers and Harbors Appropriation Act of March 3, 1899, gives such authority (which the Special Master concludes was given). (MR171-175.)

The Special Master's position with respect to complainant's claims for relief in equity raises the following issues:

1. Whether Congress *can act* to authorize an abstraction of these waters for a purpose which is unconstitutional.

2. Whether Congress *has acted* to permit this abstraction of water.

3. Whether Congress *could act* under these circumstances to permit the taking of property from complainant *without just compensation.*

Thus the issues of law are vital, far-reaching, and go to the very fundamentals. These questions involve the law upon matters of importance to the Federal and State Governments as well as the future existence of the Great Lakes-St. Lawrence waterway system. We have taken respectful exception to the Special Master's conclusions of law because we believe these issues should be decided in favor of complainant in order to be brought in harmony with:

1. The Federal Constitution.
2. The *"unmistakable"* construction of Section 10 of the Act of March 3, 1899.
3. The Property Rights of Complainant and its people.

I.

CONGRESS DOES NOT HAVE POWER TO AUTHORIZE AN ABSTRACTION OF WATER FOR AN UNCONSTITUTIONAL PURPOSE; THE DIVERSION OF THESE WATERS IS CLEARLY FOR SANITARY AND WATER-POWER PURPOSES AND NOT FOR NAVIGATION; THE ATTEMPT TO EXERCISE POWER FOR THESE PURPOSES IS THEREFORE VOID.

(Exceptions No. 26, 27, 28, 29 and 35 relate to this subject.)

By Article I, Section 8, Clause 3, United States Constitution, it is provided:

"The Congress shall have power to regulate commerce * * with foreign nations and among the several states * * *."

1. *The Constitutional limitation upon the power of Congress under the commerce clause.*

In approaching the power of Congress to regulate commerce among the several states, we do not overlook the long settled principle stated in Gibbons v. Ogden (9 Wheat. 1. 196), that the power of Congress to regulate commerce among the states is complete in itself, may be exercised to its utmost extent, and has no limitations other than are prescribed in the Constitution.

But it is also equally fundamental that Congress has only those powers which were delegated or granted by the people and expressly set forth in the Constitution.

> "The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."
>
> Martin v. Hunter, 1 Wheat, 304, 326.

> "The Government of the United States is one of delegated, limited and enumerated power."
>
> United States v. Harris, 106 U. S. 629, 635, 27 L. Ed. 290, 292.

Congress may not legislate to affect navigation adversely or to destroy navigation.

> "The power to regulate implies the existence and not the destruction of the thing to be controlled."
>
> Gd. Trunk Western Ry. v. So. Bend, 227 U. S. 544, 555.

> "And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise

inconsistent with the Constitution, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end."

United States v. River Rouge Imp. Co. 269 U. S. 411, 419.

"The authority is given to Congress for the purpose of aiding, and not destroying, navigation and commerce; so that, although authority over the stream is absolute in execution of the trust imposed in it, whatever obstructions it authorizes must be for the purpose of improving the navigation of the stream, or of facilitating commerce." * *

"One purpose of the grant to Congress of the power over commerce was, undoubtedly, to preserve the waterways for the common use of the citizens of the United States."

Farnham on Waters, Vol. I, page 60.

The power of Congress over "commerce" justifies its exercise to regulate *navigation,* but this power does not contemplate the exercise of a control over navigable waters for the purpose of *sanitation, water-power, irrigation* or other kindred uses, to which water may be put, under the guise of regulating navigation. Nor could Congress legislate to permit waters to be taken for the sole purposes of sanitation, water-power or irrigation, and not for navigation, and so as to affect navigation adversely. Under the authority to regulate navigation, Congress could not donate navigable capacity for purposes other than those contemplated within its constitutional power. The power of Congress over navigation does not justify its exercise for every purpose, solely because the subject of its general control is water, and has navigable capacity. Congress is limited to the *exercise of power over water for the purpose of navigation.*

Therefore, whenever Congress attempts to exercise power over navigable waters for the purpose of sanitation, its attempt is not in pursuance of Article I, section 8, Clause 3, of the constitution, and is void.

Farnham on Waters, Vol. I, page 59, 60;
Port of Seattle v. Oregon & Wash Ry. Co. 255 U. S. 56;
United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690;
Kansas v. Colorado, 206 U. S. 46;
United States v. River Rouge Imp. Co., 269 U. S. 411; 70 L. Ed. 339;
N. Jersey v. Sargent, 269 U. S. 328;
Barney v. Keokuk, 94 U. S. 324;
Burlington Gas Light Co. v. Burlington, etc. Rwy. Co., 165 U. S. 370;
Muhlker v. N. Y. & Harlem Ry. Co., 197 U. S. 544;
Sauer v. City of New York, 206 U. S. 536;
Woodruff v. North Bloomfield Gravel & Mine Co., 18 Fed. 753;
Withers v. Buckley, 20 How. 84, 15 L. Ed. 816;
Mobile v. Kimball, 102 U. S. 698; 26 L. Ed. 238;
Depew v. Wabash & E. Canal, 5 Ind. 8.

In Port of Seattle v. Oregon and Washington Railway Co., 255 U. S. 56, it was said:

> "First. The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation."

In Woodruff v. North Bloomfield Gravel & Mining Co., 18 Fed. 753, it is said:

> "Congress is authorized to *'regulate'* but not to *destroy* 'commerce among the states.' It may, undoubtedly, in its wisdom, obstruct, or, perhaps, destroy navigation, to a limited extent, at particular points, for the purpose of its general advantage and improvement on a larger general scale, such, for example, as by authorizing the building of a railroad or post-road bridge across a navigable

> stream; but it cannot destroy, or authorize the destruction, entire or partial, of the whole system of navigable waters of a state for purposes wholly foreign to commerce or post-roads, or to their regulation."

In United States v. River Rouge Improvement Co., 269 U. S. 411, 70 L. Ed. 339; it was likewise said:

> "The right of the United States in the navigable waters within the several states, is, however, 'limited to the control thereof for the purposes of navigation.' "

In United States v. Rio Grande Dam and Irrigation Company, 174 U. S. 690, 708, 710, the Government brought action to enjoin a private corporation from impounding and diverting the waters of the Rio Grande at a point in the territory of New Mexico where the river was not navigable. The government planted its case upon the theory that this diversion would cause an interference with the navigable capacity of the river in its lower reaches, where it would have navigable capacity. This court held that the government had the right to enjoin the impounding or diversion of waters which would substantially interfere with the navigable capacity of the lower reaches of the Rio Grande River. But it will be noticed in that case particularly that this court was accurate and precise in *limiting* the effect of that decision to the power of Congress to *protect navigable capacity.* The authority of the government to go beyond the point where navigation was affected was impliedly denied by the preciseness with which this court limited the effect of that decision to the control of water *to the extent* of control for navigation.

In State of New Jersey v. Sargent, 269 U. S. 328, 337, this court was again somewhat called upon to state the power of Congress to regulate navigable waters. It will be noticed that in that case likewise the exactness of language which was used to express this power:

"Rightly to appraise the bill one should have in mind the doctrine heretofore firmly settled that the power to regulate interstate and foreign commerce, which the constitution vests in Congress, includes the power of control, *for the purposes of such commerce* all navigable waters which are accessible to it and within the United States, whether within or without the limits of a State, and to that end to adopt *all appropriate measures to free such water from obstructions to navigation and to preserve and even enlarge their navigable capacity.*" * * *

In Kansas v. Colorado, 206 U. S. 46, the State of Kansas brought an action under the original equity jurisdiction of this court to restrain Colorado and certain corporations organized under this law from diverting the water of the Arkansas River for the irrigation of lands in Colorado. In that case the waters were not diverted from their own watershed, but their diversion was claimed to diminish the navigability of the river. The Federal government petitioned to intervene, and upon this phase of the case, in denying that petition, this Court again restated fundamental principles: that the Government of the United States is one of enumerated powers; that it has no inherent powers of sovereignty; that the enumeration of powers granted is to be found in the constitution of the United States, and in that alone; that the manifest purpose of the tenth amendment to the Constitution is to put beyond dispute the purpose that all powers not granted are reserved to the people. With this as its major premise the Court held that while Congress has general legislative jurisdiction in the *territories* and may control the flow of water in their streams, it has no power to control a like flow within the limits of the *State, except to preserve or improve the navigability of the stream.* The effect of that decision is to recognize the constitutional limitation upon the power of Congress, prohibiting any action by it relative to navigable waters, except to *protect, preserve and improve* their navigable capacity and not otherwise. Problems of irriga-

tion, sanitation and the like cannot be solved under the guise of navigation.

In Barney v. Keokuk, 94 U. S. 324, 342, it was held that the local government could not authorize permanent obstructions (such as a depot building) upon the streets of a city. The Court said in disposing of the claim that the city had a right to permit this sort of action:

> "It (the depot building) was a total obstruction of the passage; and that, as we have said, cannot be created or allowed. It is subversive of and totally repugnant to the dedication of the street as well as to the rights of the people."

Thus the rule is laid down in that case by this Court that public authorities could not authorize an obstruction in a public highway for any other purpose than that of the protection, preservation and improvement of the public highway. This same doctrine with respect to highways of travel has been followed in Burlington Gas Light Company v. Burlington Railway company, 165 U. S. 370; Muhlker v. New York and Harlam Railroad Company, 197 U. S. 544; Sauer v. City of New York, 206 U. S. 536. Surely the same rule employed by this court with respect to highways upon land would have a high degree of importance in determining its attitude upon navigable highways of commerce.

The interest of the Federal Government in navigable waters is for the purpose of preserving these natural highways. The reason this power was given to the Federal Government by the States by grant in the constitution was to prevent just such a situation as here involved,—where one state desires to take another state's property, impair and destroy navigability and to consider only the rights of its own limited portion of our national population. To prevent this interstate competition for the elements of these highways of commerce, the people wisely left their control with the Federal Government

to protect and preserve them from the onslaught of any selfishness based upon local consideration and not a national desire for the preservation and protection of the status quo of navigable waters.

2. *The diversion of these waters is for sanitary and water-power purposes and not for the purpose of navigation or commerce so as to bring it within the power of Congress.*

That the diversion of this water is for sanitary purposes nobody can possibly doubt. There may be a possibility that Congress may some day in the future see fit to adopt this channel for the purposes of navigation by rendering it physically capable of being navigated for its entire length, but at present there is no navigable connection between the sanitary canal and the Illinois waterway, so that at present at least, any diversion can be justified only upon the grounds of sanitation.

In Sanitary District v. United States, 266 U. S. 405, these same defendants relied upon the right of the state to divert these waters under its *police power* (for sewage disposal, sanitation, and water-supply purification), as against the right of the Federal Government to prohibit obstructions to navigation. But this court said (266 U. S. 405, 426):

> "The *main ground* is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the States to provide for the *welfare or necessities of their inhabitants.*"

Sewage disposal and water-supply was their defense to that action,—in fact it was their *main ground.*

Indeed, prior to the instant case, defendants did not rely upon the argument of navigation. It was admittedly a sanitary canal for the purpose of sewage disposal on the part of

the Sanitary District of Chicago, and for water-power development accruing to the State of Illinois, by which the City of Chicago and other municipalities received electric power at cost. But when it became necessary to establish a justification for this diversion, then the theory of navigation was seized upon by defendants to justify this appropriation which could not otherwise be made.

In the report of the Special Master, it is said:

> "There is no doubt that the diversion is primarily for the purposes of sanitation. Whatever may be said as to the service of the diverted water in relation to a waterway to the Mississippi, or as to the possible benefit of its contribution to the navigation of that river at low water stages, it remains true that the disposition of Chicago's sewage has been the dominant factor in the promotion, maintenance and development of the enterprise by the State of Illinois and the Sanitary District. The purpose of utilizing the flow through the drainage canal to develop power is also undoubtedly present, although subordinated to the exigency of sanitation. So far as the diverted water is used for the development of power, the use is merely incidental." (M. R. 165.)

This court, in Sanitary District v. United States, 266 U. S. 405, 424, 69 L. Ed. 362, said in describing the canal that it was used:

> "Primarily as a means to dispose of the sewage of the city of Chicago."

And again at p. 431, said:

> "It is doubtful, at least, whether the Secretary of War was authorized to consider the remote interests of the Mississippi states *or the sanitary needs of Chicago.*"

In Missouri v. Illinois, 200 U. S. 496, 526; 50 L. Ed. 512, 581, although this court could not, under the facts there pre-

sented, grant an injunction to the State of Missouri to enjoin these same defendants from polluting the water supply of St. Louis, Missouri, it was accepted and recognized that the purpose of this diversion from Lake Michigan was for sanitation or sewage disposal. At that time these defendants had not advanced the claim, nor was it suggested that the purpose of this diversion was in any way to facilitate navigation.

Indeed the courts of Illinois have spoken upon this subject as to the purpose of the diversion and there has been a series of cases passing upon this question. They have uniformly held that the purpose of this canal whereby the diversion was accomplished was to flush the sewage from Chicago and the Sanitary District.

In Beidler v. Sanitary District of Chicago, 211 Ill. 628, the Supreme Court of Illinois stated the purpose of this very abstraction as follows:

> "Again, it is evident from an examination of the act for the creation of sanitary districts, that the primary and principal purpose of their creation under the statute is to provide for the preservation of the public health by improving the facilities for the final disposition of sewage, and by supplying pure water. The fact that a navigable waterway may be created is a mere incident, and not one of the purposes for which a sanitary district is created."

Again in Chicago v. Green, 238 Ill. 258, 264 (Feb., 1909), the Illinois Supreme Court said:

> "A consideration of the various provisions of the Sanitary District act of 1899, leads, it seems, irresistibly to the conclusion that this act was passed to furnish a common outlet for the sewage of the incorporated municipalities within the limits of the district, * * *." "* * * (p. 267). The law was enacted for the purpose of constructing a main channel or outlet for all the sewers and drains of the various municipalities."

Again in Mortell v. Clark, 272 Ill. 201, 207 (Feb., 1916), the Illinois Supreme Court said:

> "The fact that a navigable waterway, however, will be created by the digging of the main channel of the sanitary district, is a mere incident and not one of the purposes for which the sanitary district was created."

Again in Sanitary District v. Chicago Packing Co. 241 Ill. App. 288. 297, (June, 1926), the Appellate court said:

> "The primary purpose of the legislature in authorizing the creation of sanitary districts and in the construction of the sanitary channel and other adjuncts by the Sanitary District of Chicago was the disposal of sewage."

In fact, such cases as Corrigan Transportation Co. v. Sanitary District of Chicago, 125 Fed. 611, 137 Fed. 851, demonstrate that navigation was adversly affected to the point where action was begun against the Sanitary district by shipping interests, which could not operate successfully upon the Chicago River because of the increased current and obstacles presented by the increase, due to the diversion of these waters from Lake Michigan for sanitary purposes.

Not only have the Supreme Court of the United States and the highest courts of Illinois stated the purposes of this canal and the diversion of water from Lake Michigan, but also the Secretary of War and the Chief of Engineers have likewise very definitely spoken about the purpose of this diversion of water.

On February 28, 1912, the Chief of Engineers, in passing upon the application of the Sanitary District for a permit, advised that the diversion of such waters was not necessary for the demands of navigation, and on January 8, 1913, the Secretary of War said:

> "On the other hand, the demand for the diversion of this water at Chicago is *based solely upon the needs of*

that city for sanitation. There is involved in this case, no conflicting claims of navigation." (MR63.)

And in the conclusion he said:

"After a careful consideration of all the facts presented, I have reached the following conclusions:

First. That the diversion of ten thousand cubic feet per second from Lake Michigan as applied for in this petition, *would substantially interfere with the navigable capacity of the navigable water in the Great Lakes and their connecting rivers.*

Second. That that being so, it would not be appropriate for me, without express Congressional sanction, to permit such a diversion, however greatly demanded by the local interest of the Sanitary District of Chicago." (MR66.)

And even in the permit granted by the Secretary of War March 3, 1925, that official constantly deals with the problem of sewage disposal, and in the letter of transmittal accompanying this permit, says: (MR80.)

"This Department has always held and continues to hold, that the taking of an excessive amount of water for sanitation at Chicago, *does affect navigation on the Great Lakes adversely.* And that this diversion of water from Lake Michigan should be reduced to reasonable limits with *utmost despatch.*"

Could anything be plainer from the findings of fact herein than that navigation has been discouraged upon the Chicago River to the point where there is no navigation at the present time, by shipping interests? In the face of all these considerations how can it be doubted that this abstraction of water from Lake Michigan is for sanitary and water-power purposes?

The Special Master says: (MR 165.)

> "In determining the constitutional authority of Congress, the purpose of the diversion is not to be considered without regard to its effect. * * When navigation is affected the power of Congress comes into play."

But if the purpose is not to be considered without the effect, likewise it is true that the *effect* is not to be considered without the *purpose*, for the effect to a large degree determines the purpose. To divorce the *purpose* from a consideration of the constitutional power of Congress to deal with navigation would result in giving power over navigable water for *any* purpose, simply because it is navigable water or affects navigable water.

The Special Master says that because the diversion *affects* navigation Congress immediately becomes invested with discretionary power to deal with the whole subject, and may thereupon permit the diversion under such power. But this reasoning disregards entirely the purpose and *extent* for which the power of Congress is called into play. To follow this reasoning it would be necessary to hold that where navigation was adversely affected. Congress may act to permit water to be further diverted for the purpose of sanitation, irrigation, or some other non-constitutional purpose, simply because navigation has been adversely affected. In short, it would mean that where the power of Congress was called into play to protect navigation, it became enlarged for the purpose of benefiting sanitation. Thus the power of Congress under the commerce clause could be enlarged to accomplish other purposes, not contemplated in the commerce clause, for the sole reason that Congress could act to protect navigation.

It is our position that in a determination of the *constitutional authority* of Congress, if the purpose be one which is beyond the scope of its power, Congress is limited to the correction of the *effect upon navigation.* In fact, its power to prohibit a diversion presupposes that such action is for the purpose of navigation. If this were not so, Congress could

enlarge upon its power under the commerce clause to include a dealing with water for every purpose, simply because navigation is affected and thus Congress could itself furnish the premise to give itself power to act, where otherwise it could not do so.

The Special Master cites as authority for his conclusion the case of Miller v. Mayor, 109 U. S. 385, where it was held that because the Brooklyn bridge affected a navigable waterway Congress had control. But the *control* of Congress was *limited to the bridge.* Because the bridge affected navigation, Congress did not have nor exercise power to go further and deal with sanitation, irrigation or any other project than the bridge, simply because its power over the commerce clause came into play for the protection of navigation.

The Special Master also cites the case of New York v. New Jersey, 256 U. S. 296, in which this court held that the Attorney General of the United States had authority to retire from the case upon terms stated in a stipulation approved by the Secretary of War, who afterwards embodied them in the construction permit issued to the sewage commissioner. But New Jersey was prevented from polluting the harbor of New York, and whatever powers were exercised were to prevent pollution of the harbor for the *purpose* of *regulating navigation.* The government did not propose nor carry out any scheme of diversion of the water of the New York harbor or other water for the purpose of sewage disposal, nor did the government deal with navigable water of the New York harbor, except for the purpose of preventing pollution which might be considered an obstruction to navigation. In that case, likewise, because the purity of the water of New York harbor affected navigation, Congress did not have power to go further and deal with sanitation, irrigation or any other project than the prevention of pollution itself, simply because its power over the commerce clause came into play. The power to *protect navigation by stopping pollution* does not give added power to destroy

or impair navigable capacity simply because the power to protect navigable capacity has *to that extent* been called into play.

There is no precedent where Congress or any official has been permitted to deal with navigable water for any other purpose than that of navigation. Only for that purpose and to that extent may Congress deal with a diversion of water. Whether the project affecting navigation embraces some other object not within the commerce clause or not, no case can be pointed to where federal authority has been exercised under the commerce clause for any other *purpose* than that of *navigation.*

Congress would not have power under the commerce clause to construct this artificial channel and divert water from Lake Michigan to flush Chicago's sewage so as to substantially interefere with the navigable capacity of the Great Lakes.

It is our position that Congress, not having power to do these acts, could not authorize an abstraction of water for the purpose of sanitation or water power development, or other non-constitutional purpose, and could not furnish authority to the defendants. Hence any attempt to exercise power for these purposes is void.

II.

THE DEFENDANTS HAVE CREATED AND ARE MAINTAINING AN OBSTRUCTION TO THE NAVIGABLE CAPACITY OF THE GREAT LAKES AND THEIR CONNECTING WATERS WITHOUT AUTHORITY FROM CONGRESS.

(Exceptions Nos. 30, 36 and 37 relate to this subject.)

The Issue

It is the complainant's position that this abstraction constitutes an obstruction to the navigable capacity of the Great

Lakes. To justify such an obstruction the constitutional authority of Congress must necessarily be given.

The constitutional authority of Congress over navigation, (admitted to exist), has never been exercised in this instance, so as to give defendants the right to abstract these waters, and thereby create this obstruction to navigation upon the Great Lakes-St. Lawrence waterway system. *Admitting the power of Congress* to act in the premises, so as to lawfully permit the diversion of this water of the Great Lakes for some great national purpose, still, *until Congress does act plainly and unequivocably, no such vast and enormous an exercise of power can be implied without some foundation.* In short the State of Michigan, *admitting the power of Congress* to deal with problems of navigation, *denies* that there has been *any constitutional and lawful exercise of that power by Congress in this instance.*

A. *This abstraction constitutes an obstruction to the navigable capacity of the Great Lakes and the Chicago River, both in fact and in law.*

The creation of a large navigable river flowing away from Lake Michigan, and carrying into the Mississippi basin an amount of water equal in increment of flow to about one-third that of the St. Clair river, and equal in volume of flow to the three largest tributary rivers of Lake Michigan, whereby the levels of the Great Lakes have been lowered at least six inches as a direct result, shows beyond peradventure that this diversion of water is *not hypothetical or imaginary, but is a real, practical, serious and menacing obstruction to the navigable capacity of the Great Lakes.*

Perhaps the clearest finding of fact by the Special Master in this whole case was:

> "I am satisfied that the evidence requires the finding that the lowering of lake levels of approximately six inches has had a substantial and injurious effect upon the carrying capacity of vessels, and has deprived naviga-

tion and commercial interests of facilities which otherwise they would have enjoyed in commerce on the Great Lakes." (MR116.)

Commerce and navigation have been substantially affected by reason of the lowering of the lake levels. This has imperiled and directly threatened navigation to such an extent that millions of tons of shipping have been cut off by the reduced margin of safety at critical points in connecting waters between the Great Lakes; millions of dollars have been lost by this unjustified limitation upon water-borne shipments; fishing and hunting grounds, beaches, summer resorts, public parks and all riparian property, including harbors and ports, with millions of dollars invested in their establishment and maintenance by the Federal Government, as well as State and local governments, and private citizens have been rendered practically useless and valueless by this extraordinary obstruction to commerce and navigation, that is without precedent in the annals of history.

Attention is respectfully called to the report of the Special Master which sustains the complaining states, without reservation upon this point, at page 104:

> "I find that the full effect of a diversion of 8,500 c. f. s. of water from Lake Michigan at Chicago through the drainage canal of the Sanitary District would be to lower the levels of Lakes Michigan and Huron approximately six inches at mean lake levels; etc."

At page 105—

> "I find that the diversion which has taken place through the Chicago drainage canal has been substantially equivalent to a diversion of about 8,500 c. f. s. for a period of time sufficient to cause, and has caused, the lowering of the mean levels of the lakes and the connecting waterways practically to the extent above stated."

At page 116—

"While there are quite definitely established routes or lanes for vessels plying between the various ports on the Great Lakes, vessels deviate from such courses in bad weather, both because of the difficulty of maintaining the course with precision under such conditions, and because of the necessity of seeking protection under weather shores. At such times, when the vessel is of necessity off the regular steamer track, a lowering of the level of the lakes increases the hazards and dangers of navigation, contributing to groundings or strandings.

"The defendants point to other diversions and artificial changes in the Great Lakes and connecting channels, which have contributed to this total lowering of levels. It is evident, however, that during a period in which the level of the Great Lakes is being lowered, an additional lowering, even of six sinches, would be even more serious in its consequence than if it occurred at a time when other causes did not operate to lower the levels of the lakes or operated to raise them."

At page 117—

"But there is sufficient evidence to require the finding that a lowering of six inches has been a substantial contribution to the injury caused by the total reduction in connection with fishing and hunting grounds, the availability and conveniences of beaches at summer resorts, and public parks."

At page 118—

"I therefore find that the complainants have established that the diversion through the Chicago drainage canal has caused substantial damage to their navigation, commercial and other interests as above stated."

In addition to the condition of the Great Lakes, at a result of this diversion, the creation of an increased and dangerous current in the Chicago River must certainly be considered an

injury to navigation. The Secretary of War has indicated his view that a current of a mile and a quarter an hour is all that is considered safe with navigation on the river. (MR 38.)

It may be concluded from these and other facts supporting the finding of the Special Master that the Sanitary District of Chicago, in diverting this water from Lake Michigan, has created "an obstruction to the navigable capacity of navigable waters of the United States,"

a. By lowering the levels of the Great Lakes, their connecting waters, and the St. Lawrence River;

b. By introducing into the Chicago River an unduly rapid current dangerous to navigation.

It may also be concluded that inasmuch as this diversion creates "an obstruction to the navigable capacity of the navigable waters of the United States" it constitutes an obstruction in law to navigable capacity.

Sanitary District of Chicago v. United States, 266 U. S. 405; 69 L. Ed. 364;
United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690;
Economy Light & Power Company v. United States, 256 U. S. 113;
United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53;
Hubbard v. Fort, 188 Fed. 987.

In Sanitary District of Chicago v. United States, 266 U. S. 405, 429, it was said:

> "As now applied it concerns a change in the condition of the lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity without regard to remote questions of policy."

In United States v. Rio Grande Dam & Irrigation Company, 174 U. S. 690, 708, an obstruction to navigation was defined as:

> "Anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States."

In Economy Light and Power Company v. United States, 256 U. S. 113, it was held that the Des Plaines River, although not navigable in fact, was not to be obstructed by a dam, so that it could not become navigable if Congress later decided to improve that stream.

In United States v. Chandler-Dunbar Water Power Company, 229 U. S. 54, 67, this court said:

> "The same fall in the water level of the lower lakes will perceptibly affect access to their ports. This was a matter of international consideration, for Canada, as well as the United States, was interested in the control and regulation of lake water levels."

In Hubbard v. Fort, 188 Federal 987, 996, the court said:

> "What is navigable capacity? Does it not mean the capability of being navigated over any part of the waters when in their normal condition?"

From the foregoing authorities it would appear that the Chicago diversion constitutes not only an obstruction in fact but an obstruction in law to the navigable capacity of the Great Lakes, and that this has been definitely established, not only by relation to definitions of the court, but by holdings of this court in which this diversion was involved.

B. CONGRESS HAS NOT ACTED TO "AFFIRMATIVELY AUTHORIZE" SUCH OBSTRUCTION, UNLESS SECTION 10 OF THE ACT OF MARCH 3, 1899, CAN BE SO INTERPRETED.

It cannot be doubted that defendants would have no right to abstract the waters of Lake Michigan to such an extent

as to cause an obstruction to their navigable capacity, without some authority from Congress. In the absence of some legislation by Congress, giving defendants this right to divert the water from Lake Michigan, it is clear that an injunction would lie, to restrain the substantial damage found by the Special Master to exist.

Sanitary District v. United States, 266 U. S. 405.

If Congress has acted at all to give this authority (which we deny) it must be by the Act of March 3, 1899 (Ch. 425, Stat. at L.) because it is conceded by the Special Master:

> "I am unable to find that Congress, apart from the authority conferred upon the Secretary of War by Section 10, of the Act of March 3, 1899, and his action thereunder * * * has authorized the diversion in question. The Acts of 1822 and 1827 relating to the Illinois and Michigan canal were considered in Sanitary District v. United States, 266 U. S. 405, 427, 428, and were found to contain nothing with regard to the amount of water to be withdrawn from the lake." (M. R. 173.)

Hence Congress has not acted to affirmatively authorize such obstruction unless section 10 of the Act of March 3, 1899, can be so interpreted. We must therefore turn to this Act to see whether Congress has acted at all to give to the State of Illinois and the Sanitary District of Chicago the right to take from Lake Michigan, a river of water that constantly drains the reservoir of an ancient highway of navigation, so that commerce is being steadily discouraged and the property interests of millions of people adversely affected.

As to the general construction of such statutes, this court, in Newport and Cincinnati Bridge Co. v. United States, 105 U. S. 470, said:

> "Congress, which alone exercises the legislative power of the Government, is the constitutional protector of

foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed."

In Fairbanks v. United States, 181 U. S. 283, 288, it was said:

"It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed."

C. UNDER SECTION 10 OF THE ACT OF MARCH 3, 1899, AN AFFIRMATIVE ACT OF CONGRESS WAS NECESSARY TO AUTHORIZE THE CREATION OF AN OBSTRUCTION TO NAVIGABLE CAPACITY; THIS SECTION DOES NOT AUTHORIZE THE SECRETARY OF WAR TO GRANT A PERMIT FOR THE ABSTRACTION OF THESE WATERS FROM THE GREAT LAKES.

Section 10 of the Act of March 3, 1899 (being Chapter 425, Section 10, 30 Stat. at L. 1121, 1151, Comp. Stat. Sec. 9910, 9 Fed. State. Anno. 2d edition, page 53) provides:

"Sec. 10. *The creation of any obstruction not affirmatively authorized by Congress,* to the navigable capacity of any of the waters of the United States *is hereby prohibited;* and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal,

lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

The language of this section is plain.

"It is a broad expression of policy in unmistakable terms. * * *"

Sanitary District v. United States, 266 U. S. 405, 429.

Instead of following the plain and positive language of this section, the effect of the Special Master's fifth conclusion of law is to hold that the words *"affirmatively authorized by Congress* mean *"affirmatively authorized by the Secretary of War,"* and that an act of Congress is *not* necessary to authorize the creation of an obstruction to the navigable capacity of a navigable water of the United States.

To reach this startling conclusion, the Special Master necessarily had to find that power has been affirmatively delegated to the Secretary of War to authorize obstructions—a permit from the Secretary of War being all that is necessary to legalize an obstruction to navigation, following a recommendation by the Chief of Engineers. To reach such a conclusion, the Special Master also had to find that in the absence of an affirmative act of Congress, it may be considered that *power may be implied* to give the Secretary of War this authority, *because Congress has not affirmatively acted to the contrary.*

With these conclusions we take respectful but firm exception. How can section 10 of the Act of March 3, 1899, be capable of such construction as to avoid the positive and unqualified language:

"That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited;" * * ?

1. SECTION 10 OF ACT OF MARCH 3, 1899, SHOULD RECEIVE A CONSTRUCTION WHICH GIVES EFFECT TO ITS PLAIN AND UNMISTAKABLE PROHIBITION AGAINST OBSTRUCTIONS TO NAVIGABLE CAPACITY.

Inasmuch as this court has said in Sanitary District v. United States, 266 U. S. 405, 429:

> "It (Act of March 3, 1899) is a broad expression of policy *in unmistakable terms.* * *"

it would appear that the action in question should receive a construction which gives effect to its "*unmistakable terms.*"

United States v. Goldenberg, 168 U. S. 95; 42 L. Ed. 394;
United States v. Lexington Mill Co., 232 U. S. 399;
Lake County v. Rollins, 130 U. S. 662;
Hamilton v. Rathbone, 175 U. S. 414;
Caminetti v. United States, 242 U. S. 485;
United States v. Wiltberger, 5 Wheat 76, 5 L. Ed. 523;
American Railway Co. v. Birch, 224 U. S. 547, 56 L. Ed. 879;
United States v. Detroit First National Bank, 234 U. S. 245; 58 L. Ed. 1298;
Adams Express Co. v. Kentucky, 238 U. S. 190, 59 L. Ed. 1267.

In United States v. Lexington Mill Company, 232 U. S. 399, 409, this court said:

> "If this purpose has been effected by plain unambiguous language and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court."

In Lake County v. Rollins, 130 U. S. 662, 670, this court said:

> "Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In view of these authorities we submit that section 10, being plain and unmistakable, its provisions can be read to mean only the following:

(a) The creation of any obstruction to the navigable capacity of a navigable water of the United States must be affirmatively authorized by Congress—*that there must be an act of Congress, general or specific, authorizing the obstruction.*

(b) A modification of the course, location, condition or capacity of any navigable waters of the United States, even though *not* amounting to an obstruction, must, to be lawful, be recommended by the Chief of Engineers and authorized by the Secretary of War.

The interpretation we have placed upon this statute was given expression in Hubbard v. Fort, 188 Fed. 987, wherein the Circuit Court in the District of New Jersey, had before it the construction of section 10 of the Act of March 3, 1899, and the precise question involved was the right to obstruct a navigable water used in interstate commerce. The court said:

> "So far as applicable to the present question, such section may be summarized thus: First, the creation of any obstruction to the navigable capacity of any waters of the United States is prohibited unless affirmatively authorized by Congress; second, it shall not be lawful to build any structure in a navigable river or water of the United States, except on plans recommended by the chief of engineers and authorized by the Secretary of War; and, third, it shall not be lawful to excavate or fill the channel of any navigable water of the United States unless such work is recommended by said Secretary of War prior to beginning the same."

Section 10 contains *three express prohibitions.* To construe these three express prohibitions, to arrive at one *affirmative authorization* is to adopt a principle of construction never before expressed by this court. It has never been held that a positive prohibition is an affirmative authorization. The effect of a principle of this kind would be to throw the whole matter of legislation into the field of judicial uncertainty, and *to say that Congress meant to authorize what it had expressly prohibited* would produce an effect as monstrous as could be imagined in the whole field of legislative construction. It is plain that Congress knew how to use words to express its intent. To say that *by the use of a negative, Congress meant an affirmative* is startling to say the least.

In United States v. Lexington Mill Company, 232 U. S. 399, 410, this court, in dealing with just such a claim, said:

> "In other words, the first and familiar consideration is that, *if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent.*"

2. REFERENCE TO THE HISTORY OF SECTION 10 OF THE ACT OF MARCH 3, 1899, SHOWS THE PLAIN INTENTION OF CONGRESS TO INCREASE ITS PROHIBITION AGAINST OBSTRUCTIONS TO NAVIGABLE CAPACITY, SO AS TO FORBID SUCH OBSTRUCTIONS IN ANY NAVIGABLE WATERS OF THE UNITED STATES EXCEPT BY AFFIRMATIVE ACT OF CONGRESS.

United States vs. Rio Grande Co. 174 U. S. 690;
United States vs. Chandler-Dunbar Co. 229 U. S. 53;
Lake Shore Ry. Co. vs. Ohio 165 U. S. 365;
United States vs. Bellingham Bay Boom Co. 176 U. S. 211;
Sanitary District vs. United States 266 U. S. 405.

In Sanitary District v. United States, 266 U. S. 405, 429, this court said:

> "If (the Act of March 3, 1899) is a broad expression of policy in unmistakable terms, *advancing* upon an earlier act of September 19, 1890, Chap. 907, Sec. 10, 26 Stat. at L. 426, 454, Comp. Stat. Sec. 9910a, which forbade obstructions to navigable capacity 'not affirmatively authorized by law' and which had been held satisfied with regard to a boom across a river by authority from a state."

The Act of September 19, 1890, Chap. 907, Secs. 7 and 10, 26 Stat. at L. 426, 454, Comp. Stat. Sec. 9910a, provided in part as follows:

> "Section 7. It shall not be lawful hereafter * * * to excavate or fill or in any manner alter or modify the course, location, condition or capacity of the channel of said navigable waters of the United States, unless approved and authorized by the Secretary of War.
>
> "Section 10. That the creation of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. * * *"

Following the enactment of the statute this court in the case of United States v. Bellingham Bay Boom Company, 176 U. S. 211 (Submitted January 18, 1899) held that the words "affirmatively authorized by law" in section 10 of the Act of 1890 included a case where an obstruction was affirmatively authorized *by a state* law where the navigable water was wholly within that state. This case came on for hearing upon an appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the Circuit Court, dismissing a bill filed by the United States for an injunction against a log boom as an obstruction to navigation. The State of Washington had passed an act which purported to affirmatively authorize log booms under certain cir-

cumstances. This court held that an act by the State came within the expression "affirmatively authorized by law" and the effect of this decision was reflected in the immediate enactment of section 10 of the Act of March 3, 1899, changing the expression of the earlier act and *advancing* the power of Congress into this field by using the expression "affirmatively authorized by Congress."

Instead of releasing its control, or delegating any greater control over navigable waters to the Secretary of War, or remaining dormant in a field where the State could act in the absence of Federal legislation, Congress deliberately chose to include more positive and unmistakable language than it used in the provisions of the act of September 19, 1890, thus specifically showing its intent to assert its paramount control over all navigable waters of the United States and keep within the power of Congress alone, absolute and complete control, without delegation to administrative officials and without permission to State Governments to authorize obstructions to navigation.

Sanitary District vs. United States, 266 U. S. 405;
United States vs. Rio Grande Co., 174 U. S. 690;
Lake Shore Ry. Co. vs. Ohio, 165 U. S. 365;
United States vs. Chandler-Dunbar Co., 229 U. S. 53;
Economy Light & Power Co. vs. United States, 256 U. S. 113.

The requirement of Section 10 of the Act of March 3, 1899, for "affirmative authorization by Congress" is much more sweeping and broad than that of the previous statute. Under the act of September 19, 1890, a State could authorize, with the consent of the Secretary of War, made upon recommendations of the Chief of Engineers, obstructions to navigation in the navigable waters of the United States, such as wharves, piers, harbors and dock lines, light houses and the like, *within the State*. But by the Act of 1899, Congress reached out and took into its own hands the control of the entire subject of

navigation in the navigable waters of the United States, including intrastate, interstate, and international waterways and thenceforth and thereafter it was contemplated that no obstructions could be made nor continued, *except upon the affirmative action of the Congress of the United States.* Thereafter, Congressional authorization was necessary. This was to be indicated through an Act of Congress, providing specific authorization for the obstruction or by express appropriation of money to be expended for the particular work under the supervision of the Secretary of War and Chief of Engineers.

The Act of March 3, 1899, manifests a clear conception of the fundamental constitutional principle that Congress having once entered the field of regulation of interstate and international navigation, thereafter the State and municipal authorities became powerless to act in the absence of an affirmative act of Congress.

> "It was an exercise by Congress of the powers, oftentimes declared by this Court to belong to it of national control over navigable streams."
>
> United States vs. Rio Grande Dam & Irrig. Co., (174 U. S. 690, 708.)

This position is supported by the opinion of Mr. Justice Hughes, in the case of Simpson v. Shepard, 230 U. S. 350, 57 L. Ed. 1511. In that case the court said substantially that the general principles governing the exercise of State authority when interstate commerce is affected, are well established. That the power of Congress to regulate commerce among the several states is supreme and plenary. It is complete in itself and will be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in our constitution. The grant of power in the constitution of its own force, without action by Congress, established the essential immunity of interstate commerce from direct control of the states with respect to those subjects embraced within the grant, which are

of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has been repeatedly declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act,

> Cummings vs. Chicago, 188 U. S. 410;
> Escanaba Transportation Company vs Chicago, 107 U. S. 678.

but when Congress does act, the exercise of its authority overrides all conflicting state legislation. In this case, under the Act of the State of Illinois of 1889, the Sanitary District of Chicago, appropriated money and entered upon the construction and completion of the sanitary channel and the introduction of water so as to constitute it a canal. By 1899 it became apparent that this obstruction might affect the navigable capacity of the navigable waters of the United States in case it was put into operation. Already a Secretary of War, on July 3, 1896, had expressed as one of the conditions of a permit of that date "that it will not cover obstructions to navigation by reason of this work while in progress, or when completed."

On April 24, 1899, the United States District Engineer at Chicago, pursuant to direction, made a report upon the application of the Sanitary District of Chicago to open the drainage canal and reverse the Chicago River, of which the material parts are as follows:

> "It is a strange fact that this city has expended or will expend, over $30,000,000 with the intention of diverting an apparently unlimited amount of water from the Great Lakes to the Mississippi drainage area for sanitary purposes without finding out whether such diversion would

be allowed by the great interests of the United States and the Colonies of Great Britain along the chain of Great Lakes in the navigation of the rivers and harbors of the Great Lakes. Now they ask the authority of an executive officer of the United States to open a channel that will to some unknown extent lower the levels of all the Great Lakes below Lake Superior and of their outlets, introduce a current also unknown and not to be ascertained otherwise than by actual experiment, in Chicago River, the most important navigable river of its length on the Globe, but which is already obstructed by bridges, masses of masonry and bends, and of difficult navigation at best.

"The possible effects of this diversion are not known, further than that to some unknown degree they will be injurious. Whether the amount of this injury will be so small as to be accepted by the interests affected in view of the manifest advantages to and apparent necessities of their neighbors, cannot be determined by other than the interests themselves." (J. R. 134.)

These facts contained in the statement of the District Engineer were undoubtedly in the possession of the War Department at that time and were considered by Congress in its action of 1899.

Congress may have had this precise situation in mind when it amended the statute and provided that thereafter there could be no obstructions to the navigable capacity of navigable waters of the United States without an affirmative act of Congress. Knowing that the defendants contemplated a diversion of water which might constitute an obstruction to navigation, and with knowledge that the Act of Illinois provided an "affirmative authorization by law," and learning through the case of United States v. Bellingham Bay Boom Company, 176 U. S. 211, that the act of Illinois satisfied this requirement, Congress saw fit to take charge of the whole field of regulation itself and to advance upon the former language, so that there could be no doubt of its meaning, and thereafter required affirmative authorization by Congress itself. Surely the his-

tory of previous and contemporaneous events gives a construction to section 10 which supports its unmistakable language. In this connection, too, it is significant that the original Act of September 19, 1890, followed closely the Illinois Act of 1889, which indicated the intention of defendants and preceded the beginning of any work upon the sanitary canal, (begun in 1892), and it is more significant that just one year previous to January 17, 1900, when the first actual reversal of the Chicago River and abstraction of water from Lake Michigan occurred Congress again saw fit to act upon the subject of obstructions to navigation, and this time to strengthen and advance its language which had recently theretofore been construed as leaving some portion of control within the State. In the light of these enactments and their contemporaneous history, can there be any reasonable doubt or question as to the intention of Congress in construing the Act of March 3, 1899?

3. BY THE LANGUAGE "OBSTRUCTION TO NAVIGABLE CAPACITY" IN SECTION 10, CONGRESS INTENDED TO PROHIBIT THIS KIND OF AN ABSTRACTION OF WATER.

United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690;
Economy Light & Power Co. v. United States, 256 U. S. 113;
United States v. Chandler-Dunbar Water Co., 229 U. S. 54;
Hubbard v. Fort, 188 Fed. 987;
Sanitary Dist. of Chicago v. United States, 266 U. S. 405.

The language,—"Any obstruction * * * to the navigable capacity of any of the waters of the United States", is not only clear and explicit, but it has been passed upon by this Court in such a manner as to leave no doubt as to its meaning. In United States vs. Rio

Grande Dam and Irrigation Company, 174 U. S. 690, 708, this Court said, with reference to section 10,—

> "It is not a prohibition of any obstruction to the *navigation*, but an obstruction to the *navigable capacity.*"

In that case the Irrigation Company was proceeding to construct a dam across the Rio Grande River, and to appropriate the waters of that stream for the purposes of irrigation. The Rio Grande River was not navigable at that point, but became a navigable river at a point considerably lower down in its course. Under the issues raised by the pleadings, the facts were assumed to be that most of the flow of the river had already been appropriated by other parties, and the defendant proposed to take the balance. This, according to the averment of the defendant, "would be very largely only so acquired from the excess storm and flood waters now unappropriated, useless and going to waste".

This Court said: (page 708)

> "It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the Territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. *It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition.* Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct

> control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question. And it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream."

It will be noticed that this court used this language "*anything wherever or however done, within the limits of the jurisdiction of the United States which tends to destroy th navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition.*" These words "anything wherever done or however done" seem broad enough to cover that kind of obstruction which substantially interferes with commerce, causes ships to be less heavily loaded so that they may navigate the critical points; cuts off the water from fishing and hunting grounds, beaches, summer resorts, public parks and harbors and ports of the State of Michigan and other states.

If this Court has seen fit to apply this language to that portion of the Rio Grande River, above its navigable depths, how much more do the Great Lakes and their connecting waters, deserve the protection and preservation of their navigable capacity? These waters are the greatest center of inland, commercial navigation in the world, affecting millions of people and their property rights; and the condition of commerce and navigation is affected directly by the amount of diversion of water from Lake Michigan. How much more does the term "navigable capacity" refer to these waters than those dealt with by the Court in the case of United States vs. Rio Grande Dam and Irrigation Company, *supra?*

That case was remanded by this Court, directing,—

> "An inquiry into the question whether the intended acts of the defendants * * * will sub-

> stantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish."

The finding of the Special Master in this case amply supports this requirement by finding: (M. R. 118.)

> "I therefore find that the complainants have established that the diversion through the Chicago drainage canal has caused substantial damage to their navigation, commercial and other interests as above stated."

From this finding,—that there is substantial damage to navigation, commerce and other interests,—it follows that there is a substantial obstruction to navigable capacity.

In Economy Light and Power Company vs. United States, 256 U. S. 113, the United States sought by injunction to restrain the Power Company from constructing a dam in the Des Plaines River. The District Court found that there was no evidence of actual navigation within the memory of living man, and that there would be no present interference with navigation by the building of the proposed dam. The Circuit Court of Appeals did not disturb this finding, but both courts found that in its natural state the river was navigable in fact. Upon this state of facts this Court found:

> "We concur in the opinion of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the states, is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions."

If this Court saw fit in a case of that kind to protect the navigable capacity of a stream which was actually non-navigable at that time, how much more necessary would it seem to be to preserve the navigable waters of the Great Lakes, when obstructions to its commerce and navigation are shown to exist by the lowering of the levels at least six inches, whereby these great, inland waterways are jeopardized and their commerce and navigation imperiled! How much more should these navigable waters of the Great Lakes have the protection of this Court to assure their preservation for future transportation than the Des Plaines River, which was protected in Economy Light and Power Company vs. United States, supra!

The question is not how much money damage is present nor even whether the obstruction to navigable capacity is slight or substantial (although both of these elements are present to a large degree in this case), but the real question is whether there is any *obstruction to navigable capacity.*

In United States vs. Chandler-Dunbar Water Power Company, 229 U. S. 54, 66, 67, where the Government acted to preserve the Great Lakes, this Court said:

> "That outflow (from Lake Superior) has great influence both upon the water level of Lake Superior and also upon the level of the great system of lakes below, which receive that outflow. A difference of a foot in the level of Lake Superior may influence adversely access to the harbors on that lake. The same fall in the water level of the lower lakes will perceptibly affect access to their ports. This was a matter of international consideration, for Canada, as well as the United States, was interested in the control and regulation of the lake water levels."

In Hubbard vs. Fort, 188 Fed. 987, 996, the Court said:

"What is navigable capacity? Does it not mean the capability of being navigated over any part of the waters when in their normal condition? And how can it be said that the structures or the works subsequently referred to in this section may not amount to an obstruction to such navigable capacity? It is to be noted that 'excavate or fill' is associated with 'alter or modify the course, location, condition or capacity of any' navigable water, all of which may be so performed as to become serious obstructions to navigation. That such obstructions may be but slight, and that some will be of only temporary duration would not make them any less obstructions, and within the prohibition. Any less comprehensive interpretation of the first part of section ten would do violence to its language and, as already said, be meaningless."

It was also said in Sanitary District of Chicago vs. United States, 266 U. S. 405, 429; 69 L. Ed. 364:

"As now applied it concerns a change in the condition of the lakes and the Chicago river, admitted to be navigable, and, if that be necessary, *an obstruction to their navigable capacity* (U. S. vs. Rio Grande Dam & Irr. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770) without regard to remote questions of policy."

4. BY THE USE OF THE LANGUAGE "AFFIRMATIVELY AUTHORIZED" CONGRESS CONTEMPLATED RETENTION OF CONTROL OVER OBSTRUCTIONS TO NAVIGABLE CAPACITY AND NOT A DELEGATION OF POWER TO THE SECRETARY OF WAR; A POSITIVE PROHIBITION IS NOT *AN AFFIRMATIVE* AUTHORIZATION.

As to the meaning of the term "affirmatively authorized" there can be no doubt. There must be Federal authority and that must be an *Act of Congress*. As this

term is used in section 10 of the Act of March 3, 1899, there is no doubt as to its meaning and intent,—*in case of an obstruction to navigable capacity there must be an Act of Congress.*

In Hubbard vs. Fort, 188 Fed. 987, 996, the Court said:

> "What is affirmative authorization? Affirmative is the antithesis of negative. The use of the word 'affirmatively' with 'authorized' would be difficult to understand except for the use of the word 'authorize' in the latter part of this section where the building of certain structures and the performing of certain works are forbidden without the authority of the Secretary of War. As pointed out by V. C. Walker in the New Jersey case, this section 'does not provide that it shall be lawful for the Secretary of War to authorize the excavation of land in the channel of any navigable water of the United States, but only that it shall not be lawful to do the work without the authorization of the Secretary and before beginning the work.' In view of the context, the word 'affirmatively' was legislatively used to distinguish the two kinds of authority referred to, and to make it plain that the initial authorization to create an obstruction was not to rest on implied, but express—affirmative—congressional authority."

As to the use of the word "authorize" with reference to the Secretary of War's act in the third clause of this section, the court, in Hubbard v. Fort, *supra,* said:

> "The use of the word 'authorize' instead of 'approve' does not change the Secretary of War's act from permissory to plenary. Two of the definitions of the word 'authorize' are to approve of; to formally sanction. Cent. Dict. & Cyc. What does the Secretary of War authorize? Not the building of the structures mentioned in the second part of this section, but the plans to which such construction is to conform. And what does he authorize as to excavating, filling, altering, etc., of the channel of navigable waters, but the commencement, the character,

and the manner of doing such work? * * * The Secretary of War's authorization is supervisory, and relates to the character and performance of the work, and not the directing or authorizing it to be done in the first instance. * * * Among the changes effected by the act of 1899 was to require the affirmative authorization by Congress to create any obstruction to the navigable waters of the United States, except that bridges, dams, dikes, and causeways in or across waters the navigable portions of which lie wholly within the limits of a single state were permitted if authorized by state legislation and the location and plans of such structure were approved by the chief of engineers and of the Secretary of War. Perhaps without the change from 'authorized by law' to 'authorized by Congress' no obstruction to the navigable capacity of interstate waters without affirmative congressional enactment would have been lawful, but a present reading of the law in the light of the history of its enactment clearly evinces to my mind a legislative purpose to require affirmative action on the part of Congress before such a crossing of interstate streams as contemplated by complainants in this suit shall be permitted, and that only when such congressional action shall have been taken can the powers delegated to the Secretary of War be put into operation."

5. UNDER SECTION 10 AN AFFIRMATIVE ACT OF CONGRESS IS NECESSARY AS A CONDITION PRECEDENT TO THE EXISTENCE OF ANY POWER IN THE SECRETARY OF WAR TO AUTHORIZE OBSTRUCTIONS TO NAVIGABLE CAPACITY.

Hubbard v. Fort, 188 Fed. 987;
Penn. v. Wheeling Bridge Co., 13 How. 518; 14 L. Ed. 249;
West Chicago Street Railway Co. v. Illinois, 201 U. S. 506, 527; 50 L. Ed. 845, 854;
Cobb v. Lincoln Park, 202 Ill. 427;
Wilson v. Hudson County Water Co., 76 N. J. Eq. 543.

In Hubbard v. Fort, *supra,* it was said:

> "Among the changes effected by the Act of 1899 was to require the affirmative authorization of Congress to create any obstruction to navigable waters of the United States, except that bridges, dams, dikes, and causeways in or across waters the navigable portions of which lie wholly within the limits of a single state were permitted if authorized by state legislation and the location and plans of such structures were approved by the chief of engineers and of the Secretary of War. Perhaps without the change from 'authorized by law' to 'authorized by Congress' no obstruction to the navigable capacity of interstate waters without affirmative congressional enactment would have been lawful, but a present reading of the law in the light of the history of its enactment clearly evinces to my mind a legislative purpose to require affirmative action on the part of Congress before such a crossing of interstate streams as contemplated by complainants in this suit shall be permitted, and that only when such congressional action shall have been taken can the powers delegated to the Secretary of War be put into operation.

In Wilson v. Hudson County Water Company, *supra,* it was said:

> "The only intention discoverable is, as already said, the authorization of such a work if it may be lawfully done, and the intention is to authorize it to be done only in such way as to prevent its being any obstruction to navigation. Congress may some day be induced to enact a law under the commerce clause of the federal constitution which will make a grant of power such as is contended for by the Water Company in this case, but up to the present time, it has not done so, and the Water Company, without a grant of power, is seeking to prosecute an unlawful work —a work not unlawful in and of itself, but unlawful so far as it appropriates the land and invades the rights of the State of New Jersey, and this by ob-

taining a mere license from a supervisory power,—a license to do the thing desired, efficacious only if and when lawful authority to prosecute the work shall have been obtained.

"In this connection it may be observed that the tenth section of the River and Harbor act does not provide that it shall be lawful for the Secretary of War to authorize the excavation of land in the channel of any navigable waters of the United States, but only that it shall not be lawful to do the work without the authorization of the Secretary, had before beginning the work. The section as worded clearly contemplates that the consent of the Secretary shall merely be permissive of the doing of work for which authority already exists."

In Cobb v. Lincoln Park Commissioners, 202 Ill. 427, 63 L. R. A. 264, 95 Am. St. Rep. 258, the court said:

"We are of the opinion that the act prohibiting the erection of wharves without the consent of the Secretary of War is a mere regulation for the benefit of commerce and navigation, and that the license or permission of the Secretary of War is only a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation, and not that it is equivalent to a positive declaration by the authority of Congress that the licensee may build the wharf or other structure without first obtaining the consent of the owner of the submerged land on which it is his purpose to build. Appellant not having, by the law of this State, the right to construct a wharf over his neighbor's submerged lands without his neighbor's consent, could not acquire that right, without his neighbor's consent, by obtaining a license from the Secretary of War."

Section 10 of the Act of March 3, 1899, definitely and positively prohibits "*obstructions to navigable capacity.*" It does not prohibit those works which are *in the aid of navigation.* But those works which are a benefit to navi-

gable capacity are prohibited by section 10 *unless* they comply with administrative requirements to be fixed by the Secretary of War, so that they will not themselves become obstructions to navigation. Thus the *prohibition against obstructions to navigable capacity is absolute* while the *prohibition against other works* specifically mentioned *is conditioned* upon the following:

First: That the work shall not become an obstruction.
Second: That the work shall receive the approval of the Secretary of War.

The kind of work contemplated in the last two clauses of section 10 is that which does not obstruct navigation *per se,* but which may be constructed only under administrative direction, upon recommendation of the Chief of Engineers and approval of the Secretary of War. But if in such work there is involved an obstruction to navigable capacity, the affirmative authorization of Congress is just as positively required as though these clauses did not exist. The function of these two clauses in addition to the first clause of section 10 is to prohibit certain work, even though beneficial to navigation, unless recommended by the Chief of Engineers and authorized by the Secretary of War. Instead of being an exception or limitation upon the first section, these two clauses constitute additional prohibitions in all cases where the work is not in fact an obstruction to navigation but a benefit to navigable capacity. These requirements are necessarily imposed for the further limitation of beneficial work affecting navigation.

It is obvious that any of this work contemplated in the second and third clauses, may be carried on in a place or in a manner which will not obstruct the navigable capacity of water but may, in fact, improve navigation,

providing the directions of the Secretary of War are followed. But this does not operate to remove the positive prohibition in the first clause against any obstruction to navigation without an affirmative authorization by Congress, but rather accentuates the reason for the requirement that any work which is not an obstruction to navigation must have the authorization of the Secretary of War prescribing such administrative details as are necessary to insure its not becoming an obstruction.

It will be noticed that the language of the whole section is prohibitive in character, and that the second and third clauses are joined by the conjunction "and", meaning "in addition". (Century Dictionary.) The term "or" is not used in connection with these clauses, and the power over the construction of certain works which are obstructions to navigation, is *not alternative.* From this we gather the intent of Congress that its control over obstructions to navigation is supreme, and that in addition to this sweeping prohibition, Congress desired to further limit even those works which might appear to be beneficial to navigation by imposing the duty upon the Secretary of War to restrict even such works so that they might not become obstructions.

If section 10 stopped at the end of the first clause, the prohibition against obstructions without affirmative authorization by Congress would give implied permission to construct any work which was not an obstruction to navigable capacity. Perceiving this, Congress proposed in the second and third clauses to provide the manner of approval of those works which were not obstructions to navigation *per se,* but might become so if unregulated and therefore needed administrative supervision to prevent their becoming obstructions in fact

In short, the second and third clauses of section 10 of the Act of March 3, 1899, were in aid of the first clause,

and in addition thereto, so that those cases which were not obstructions to navigable capacity *per se*, would not become so in fact. Instead of being a limitation upon the power of Congress it is an expression declaring the power of Congress. Instead of being an affirmative act of Congress delegating authority to the Secretary of War, over obstructions generally, this section prohibits any and every obstruction to navigable capacity *except upon express authority from Congress*, and then proceeds to prohibit all other works except upon approval of their administrative details by the Secretary of War.

6. OBSTRUCTIONS TO NAVIGABLE CAPACITY OF INTERSTATE WATERS WITHOUT AUTHORITY FROM CONGRESS HAVE ALWAYS BEEN UNLAWFUL; WHEN AN OBSTRUCTION TO NAVIGATION EXISTS IN FACT IN INTERSTATE WATERS CONGRESS ALONE MAY AUTHORIZE ITS CONTINUANCE BUT ONLY BY AN AFFIRMATIVE ACT.

Pennsylvania v. Wheeling Bridge Co., 13 How. 518;
Bridge Company v. United States, 105 U. S. 470;
Miller v. Mayor of New York, 109 U. S. 385;
Gibbons v. Ogden, 9 Wheat. 190;
Sault Ste. Marie v. International Transit Company, 234 U. S. 333;
Cooley v. Port Wardens, 12 How. 299, 319, 13 L. Ed. 996, 1004.

Before either the Act of September 19, 1890, or the Act of March 3, 1899, the rule had been established by numerous cases that obstructions to the navigable capacity of *interstate waters* were unlawful without authority from Congress. The Acts of 1890 and 1899 reached out and advanced the power of Congress to *all* navigable waters of the United States, but the rule remained as before with respect to interstate waters, and these acts became declaratory of Congress' admitted control.

In Pennsylvania v. Wheeling Bridge Company, 13 How. 518, 625; 18 How. 421, this court held that when an obstruction to navigation exists in fact Congress may still authorize its continuance, but must do so by some affirmative act declaring its qualified intent to authorize such obstructions.

In the Wheeling Bridge case, this court had already declared that the bridge in question was an obstruction in fact to navigation, and had enjoined it as such. When an affirmative act of Congress was thereafter passed, declaring the bridge not to be an obstruction to navigation, it was held that Congress had this power, but only by an affirmative act. The decision of this court governed the case until Congress acted affirmatively. Hence an obstruction in fact would have remained an obstruction in law in the absence of an affirmative act of Congress. From this we extract the principle that in the absence of an affirmative act of Congress, this court has jurisdiction to declare and enjoin an obstruction to navigable capacity of interstate waters, where there is a *substantial obstruction to navigation in fact* and when Congress has not acted affirmatively in the premises.

In Economy Light & Power Co. v. United States (256 U. S. 113, 117, 123) it was held that, in the absence of action by Congress authorizing an obstruction to navigation this court had power to enjoin its continuance.

The power exercised by Congress in the Wheeling Bridge case to declare a bridge not to be an obstruction to navigable capacity is precisely what is needed to authorize an obstruction under section 10 of the Act of 1899. The control of Congress over navigable capacity in interstate waters was not lessened by its subsequent legislation positively and unmistakably forbidding the creation of any obstruction in any of the navigable waters of the United States without its own action. Congress' assertion of its paramount power over intrastate waters did not lessen its previously exercised and oft-declared power over interstate waters. Instead of diminish-

ing or delegating this power, Congress restated and declared that it remained one of its own powers which should not be infringed, unless "affirmatively authorized." From its action in the Wheeling Bridge case, Congress showed that it recognized the meaning of the term "affirmatively authorized" and that it was to be construed as an affirmative act of Congress. Both before and after the acts of 1890 and 1899 Congress had and exercised exclusive power to authorize obstructions to navigable capacity in interstate waters, without delegating any authority to the Secretary of War. The Acts of 1890 and 1899 were declaratory of Congress' intention to *retain control and advance its power to all navigable waters.* No stronger retention of power could be expressed than the expressions of Congress to deal with obstructions *alone,* without reservation, limitation or delegation.

7. IT WOULD BE AN UNCONSTITUTIONAL APPLICATION OF SECTION 10 OF THE ACT OF MARCH 3, 1899, TO CONSTRUE THIS SECTION AS DELEGATING AUTHORITY TO THE SECRETARY OF WAR TO PERMIT DIVERSION OF THESE WATERS FROM LAKE MICHIGAN FOR PURPOSES OF SANITATION, OR TO "AFFECT NAVIGATION ADVERSELY."

Port of Seattle v. Oregon & Wash. Ry. Co., 255 U. S. 56;
Kansas v. Colorado, 206 U. S. 46;
United States v. River Rouge Imp. Co., 269 U. S. 411;
Sanitary Dist. v. United States (266 U. S. 405).

The constitutional power of Congress over commerce and navigation is the measure of the limitation upon its delegation of power to the Secretary of War. Congress itself is limited in the exercise of power to regulate *navigation,* and no other purpose can be served under the guise of navigation.

In Sanitary District v. United States, 266 U. S. 405, 431, this court said:

"It is doubtful, at least, whether the Secretary (of War) was authorized to consider * * * * the sanitary needs of Chicago."

Whether or not Congress would have the power to legislate, regulate, control and improve sanitary conditions, there can be no claim in this instance that by the Act of March 3, 1899, Congress even attempted to delegate to the Secretary of War any power to authorize an obstruction to navigation for the purposes of sanitation, or to "affect navigation adversely."

Independent, therefore, of whether the Secretary of War had power delegated to him by section 10 to authorize obstructions to navigation (which we strenuously deny), still the Secretary of War would not have authority to permit or authorize obstructions to navigation *for the purpose of sanitation.*

Hence, if section 10 of the Act of March 3, 1899, be so construed as to delegate to the Secretary of War the power to authorize an obstruction to navigation, yet if in the exercise of this claimed right, he attempts to permit an obstruction to navigation for the purpose of sanitation and not navigation, his act would be void. Such an application of section 10 would give the Secretary of War delegated power to authorize an obstruction for sanitary purposes. This would be an unconstitutional application, and therefore void.

(a) *The Secretary of War used his delegated power (if any) to authorize this obstruction for sanitary purposes and not for navigation, which is an unconstitutional application of section 10, and therefore void.*

In the report of the Special Master, (pages 75-81), there are contained, the report of the Chief of Engineers, the permit of March 3, 1925, and the letter of transmittal by the Secretary of War.

In the report of the Chief of Engineers it was said by him: (M. R. 75, 76)

"3. The first condition recommended by the district engineer provides for the adoption and execution of a program of construction of modern sewage disposal plants at such a rate as to provide before the end of five years for treatment of the sewage of a human population of 1,200,000. * * *

4. The program of construction recommended is limited to five years, as it is not possible to predict what advances may be made in the science of sewage disposal during the next five years. It is entirely within the realms of possibility that, during that period, such advance may be made as to warrant the Department's insisting on an even more rapid rate of progress thereafter, should a renewal of this permit be sought. A shorter period for the permit is not believed advisable, as it would be difficult to prescribe sufficient progress in the way of construction of sewage treatment plants and require a substantial reduction in the diversion upon the renewal of the permit.

5. It is estimated that the construction of sewage treatment plants for a population of 1,200,000 will permit a reduction in the necessary diversion from Lake Michigan of about 1,250 cubic feet per second. * * *

6. It is, of course, highly desirable that the excessive diversion of water from Lake Michigan be reduced to reasonable limits with the utmost despatch. For humanitarian reasons, it is impracticable to make the desired reduction instantaneously, and it is believed that the procedure proposed by the district engineer is the most reasonable and just to all concerned that can be adopted."

From the foregoing it is to be seen that the basis of the Secretary of War's permit upon the recommendation of the Chief of Engineers was in contemplation of "sewage" and "sewage treatment plants," and the effect of the diversion upon sewage disposal. That was the sole consideration of the Chief of Engineers. Deep concern is shown in his report for the result of continuing water diversion upon the lake levels of the Great Lakes and upon commerce and navigation. With great reluctance the Chief of Engineers deals with the

"necessity" of diverting these waters for sewage disposal purposes and finally concludes that *"for humanitarian reasons"* it was impracticable to make the *"desired reduction"* instantaneously. In short, the report of the Chief of Engineers gives no authority in law for a finding upon which the Secretary of War could apply the provisions of section 10. The report of the Chief of Engineers treated solely with *sewage* and *sewage disposal* as the purposes of the diversion; (which is the truth of the matter),—and any construction of section 10 of the act of Congress of March 3, 1899 held to delegate power to authorize obstructions to navigation, does not bear a constitutional application when exercised for the purpose of relieving a problem of sewage disposal.

Following the report of the Chief of Engineers, the Secretary of War, after a hearing, granted the permit of March 3, 1925, under which defendants are claiming to operate. In his permit the Secretary of War said (M. R. 79-80):

> "4. That the Sanitary District of Chicago shall carry out a program of sewage treatment by artificial processes which will provide the equivalent of the complete (100 per cent) treatment of the sewage of a human population of at least 1,200,000 before the expiration of the permit.
>
> * * *
>
> 7. That the execution of the sewage treatment program and the diversion of water from Lake Michigan shall be under the supervision of the U. S. District Engineer at Chicago, etc.
>
> * * *
>
> 9. That if, in the judgment of the Chief of Engineers and the Secretary of War, sufficient progress has not been made by the end of each calendar year in the program of sewage treatment prescribed herein so as to insure full compliance with the provisions of condition 4, this permit may be revoked without notice."

In his letter of transmittal the Secretary of War under date of March 3, 1925, said:

> "This Department has always held and continues to hold that the taking of an excessive amount of water for sanitation at Chicago does affect navigation on the Great Lakes adversely, and that this diversion of water from Lake Michigan should be reduced to reasonable limits with utmost despatch. I appreciate that the desired reduction cannot be made instantaneously, but with the view of making a substantial reduction by the time this permit expires, the conditions require, among other things, the artificial treatment of the sewage of a large population, the construction of controlling works to prevent the discharge of the Chicago River into the lake and the metering of the water service of the city of Chicago. * * *
>
> While it is not in my province to dictate, I sincerely urge * * * that arrangements be made with the packers and the Corn Products interests to treat their waste before discharging it into the sewers. * * *" (M. R. 80.)

From the foregoing permit and letter of transmittal it is painfully apparent that what the Secretary of War was attempting to do was to take care of a *necessitous* circumstance in his opinion, and upon the grounds of *expediency* to declare his assent *reluctantly* to the abstraction of this water. It will be noticed particularly, that the only consideration was sanitation when he said "this department has always held and continues to hold that the taking of an excessive amount of water for sanitation at Chicago *does affect navigation on the Great Lakes adversely,* and that diversion of waters from Lake Michigan should be "reduced to reasonable limits," with utmost despatch," and so there may be no doubt as to the purpose of the permit and the sole consideration prompting it, it will be noticed that the Secretary of War used the words himself *"the taking of an excessive amount of water for sanitation at Chicago."* If words have their ordinary meaning,

how can it be reasoned by the defendants that when the Secretary of War granted a permit to take this water *"for sanitation,"* that this was "for navigation" and that authority was derived by a constitutional application of section 10 of the Act of March 3, 1899, which (if at all), delegated authority over obstructions to navigation for the purpose of *navigation* and *not sanitation.*

The situation is clear in the light of contemporaneous events. The Supreme Court of the United States had held in Sanitary District of Chicago v. United States, 266 U. S. 405, (decided January 5, 1925), that the Sanitary District of Chicago was diverting a large amount of water from Lake Michigan unlawfully. Something had to be done by the sanitary district or its sewage disposal plan would suddenly end. A hearing upon a petition was promptly accorded and to provide *"a way out,"* the Secretary of War reluctantly but with utmost regard for the expediency of the sewage disposal problem, attempted to exercise an authority delegated (if at all) for the purpose of navigation in a case where navigation was *"adversely affected,"* and in which *sanitation* or *sewage disposal* was the sole consideration,—and admittedly so.

8. THE LANGUAGE OF SECTION 10 OF THE ACT OF MARCH 3, 1899, IS NOT SUSCEPTIBLE OF CONSTRUCTION BY REFERENCE TO THE SO-CALLED RULES IN AID OF CONSTRUCTION USED BY THE SPECIAL MASTER.

(a) *The Rule of ambiguity is not applicable here.*

In his report (p. 184) the Special Master says:

> "Where an act of Congress is ambiguous, long continued and uniform practice of the executive department charged with the duty of administering it is 'persuasively determinative of its construction'."

This *assumes* that the language of the section is *"ambiguous."* But this Court in the case of Sanitary District v. U. S. 266 U. S. 405, 429 said:

> "It is a broad expression of policy *in unmistakable terms,* advancing upon an earlier Act of Sept. 19, 1890. * * *"

If there be any ambiguity in section 10 it certainly cannot exist in the first clause which clearly provides:

> "That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited."

Surely this language of section 10 is not susceptible to "administrative" construction because there is *no ambiguity* in such language. It is a general sweeping prohibition. This court has held

> When the language of the statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.
>
> United States vs. Wiltberger, 5 Wheat. 76;
> United States vs. Detroit First National Bank, 234 U. S. 245;
> Adams Express Co. vs. Kentucky, 238 U. S. 190;
> United States vs. Fisher, 2 Cranch 358;
> Merritt vs. Welch, 104 U. S. 694;
> United States vs. Dickson, 15 Pet. 141;
> Amy vs. Watertown, 130 U. S. 320;
> United States vs Rider, 163 U. S. 132.

b. The rule of construction based upon the practice of the War Department in administering section 10 is not applicable because the practice of that Department has not been uniform but has been constantly in doubt from the beginning, even to the extent exercised.

United States v. Healey, 160 U. S. 136;
Wisconsin Central R. R. v. United States, 164 U. S. 205;
United States v. Johnson, 173 U. S. 378;
Houghton v. Payne, 194 U. S. 88;
United States v. Graham, 110 U. S. 219;
United States v. Finnel, 185 U. S. 236;
Edwards' Lessee v. Darby, 12 Wheat. 206;
United States v. Temple, 105 U. S. 97;
Swift Company v. United States, 105 U. S. 691;
Ruggles v. Illinois, 108 U. S. 526.

From the very first permit, the Secretary of War has consistently refrained from expressly authorizing obstructions to navigation. Each permit has expressly prohibited obstructions to navigation, and in nearly all, the Secretary of War has expressed his belief that the matter is one for Congress and his intention to submit the matter to Congress. In some cases he has actually refused to grant a permit because of long standing doubt as to the Department's authority to go further. Each permit has been reluctant in its terms, and has not contemplated the authorization of any obstructions to navigation. In no permit is there any language wherein the Secretary of War authorizes obstructions to navigation or expressly allows defendants to do so.

Briefly tracing the permits issued by the Secretary of War, we find the following:

In the first permit, May 8, 1899, the Secretary of War provided: (M. R. 39.)

> "1. That it be distinctly understood that it is the intention of the Secretary of War to submit the questions connected with the work of the Sanitary District of Chicago *to Congress for consideration and final action, and that this permit shall be subject to such action as may be taken by Congress.*"

This language certainly does not sustain any administrative construction of this action to mean that the Secretary of War believed his power existed independent of Congress, but indicates that the authority was doubted from the very first and was never expressly attempted to be exercised. This is not a case of a Federal Department providing rules and regulations for the government of its departmental matters under ambiguous terms of a Federal statute. In such a case custom of the department, long continued by successive officers, would prevail. On the other hand, this is a case wherein, from the very beginning, the department either recognized its lack of power and refused to act in the field prohibited by Congress, or if action occurred at all, acted to the extent of its authorized power, and prohibited by conditions in the permit any obstructions to navigable capacity.

In Houghton v. Payne, 194 U. S. 88, 100, this Court said:

> "It is well established that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. * * *
>
> "A custom of the department, however long continued by successive officers, must yield to the positive language of the statute."

Thus the custom of the War Department is material only if the language of the statute (section 10) is ambiguous. Assuming, therefore, an ambiguity, yet this court has said in United States v. Healey, 160 U. S. 136, 145:

> "But as the practice of the Department has not been uniform, we deem it our duty to determine the

true interpretation of the Act of 1877 without referring to the practice in the Department."

We respectfully submit that the most that can be claimed by defendants for the practice of the War Department by way of implied authority is that *its practice has not been uniform* and that some times permits have been granted with conditions against obstructions to navigation, and other times permits have been refused altogether.

In the permit of July 11, 1900, the same conditions were imposed as in the permit of May 8, 1899. (M. R. 40.) In the permits of April 9, 1901, and July 23, 1901, the previous permit was amended as to quantity and time, but with like condition. (M. R. 41.) The permit of December 5, 1901, was in substantial accord with the previous permits, (M. R. 42) as was that of January 17, 1903. (M. R. 43.) On March 13, 1907, the War Department denied a permit because of certain reasons, among which is the following in the Report of the Chief of Engineers: (M. R. 49.)

"3. In my opinion, this abstraction will undoubtedly lower the levels of all the waters of the Great Lakes, except those of Lake Superior, and thus diminish the navigable capacity and depth of the various channels and harbors which have been deepened and improved under authority of Congress.

* * *

"5. * * * Any project that tends, in a measure, to annul or reverse the orders of Congress, as expressed in the various river and harbor acts appropriating funds for improving the harbors and channels connecting with the Great Lakes, should meet the disfavor of the Department, unless it has been sanctioned by that body. * * *"

And the Secretary of War concluded, March 14, 1907:

> "* * * It may be fortunate that circumstances now require submission of this question of capital and national import to the Congress of the United States." (M. R. 51.)

In the permit of June 30, 1910, the Acting Secretary of War said: (M. R. 59)

> "(a) That it be distinctly understood that it is the intention of the Secretary of War to submit the questions connected with the work of the Sanitary District of Chicago to Congress for consideration and final action, and that this permit shall be subject to such action as may be taken by Congress."

In the refusal to grant a permit by the Secretary of War January 8, 1913, it was said: (M. R. 63)

> "The discretion given to the Secretary of War under Sections 9 and 10 of the Act of 1899 is very broad, but I have very grave doubts as to whether it was intended to authorize him to grant a permit which would inflict a substantial injury upon commerce in order to benefit sanitation. The entire purpose and scope of that legislation was to make him the guardian of the commercial interests of the Nation represented in their waterways. * * *
>
> "They are broad questions of international policy. They are quite different in character, for example, from the question of fixing the proper location of a pierhead line or the height or width of a drawbridge over a navigable stream—fair samples of the class of questions which come to the Secretary of War for decision under the above mentioned Act of 1899. While the researches and opinions of experts in the respective fields are necessary and useful as an assistance towards reaching a fair and proper policy, the *final determination of that policy should belong,* not to an administrative officer, but rather to those bodies to whom we are accustomed to entrust the making of our laws and treaties."

In the report of the Chief of Engineers of March 3, 1925, it will be noticed how reluctant and hesitant he approaches the problem and finally places it upon "humanitarian reasons", all the time dealing with the cutting down of the diversion to eliminate the obstruction, which is reflected in every syllable of the permit granted by the Secretary of War. (M. R. 75-77.)

Surveying these permits, one and all, they express the undeniable conclusion that the Secretaries of War, respectively, did not believe their power extended to permit an obstruction to navigation. To say that the construction of this statute by the War Department is "persuasively determinative" that there was delegated power over obstructions is hardly in keeping with these expressions by the War Department. We respectfully submit that the construction of section 10 is not determined by the departmental construction which indicates, if at all, that the power of the Secretary of War was *constantly in doubt from the beginning,*—and rightly so!

c. THE DECISION OF THIS COURT IN SANITARY DISTRICT V. UNITED STATES DOES NOT CONSTRUE OR INTERPRET SECTION 10 AS DELEGATING POWER TO THE SECRETARY OF WAR TO AFFIRMATIVELY AUTHORIZE AN OBSTRUCTION TO THE NAVIGABLE CAPACITY OF THE GREAT LAKES.

In his Report, the Special Master (M. R. 189) says:

"Finally, the authority of the Secretary of War under Section 10 of the Act of 1899, is deemed to have been involved, and to have been passed upon by this Court, in Sanitary District v. United States, 266 U. S. 405, where the Court said in reference to Section 10 (id. p. 429):

> " 'There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the Lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity, United States v. Rio Grande Dam & Irr. Co. 174 U. S. 690, without regard to remote questions of policy. It is applied prospectively to the water henceforth to be withdrawn. This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War.' "

In Sanitary District v. United States, the Government was attempting to prohibit the abstraction of a greater quantity of water than 4,167 c.f.s. The purpose of that suit was to settle the question whether the Sanitary District could exceed the maximum of 4,167 c.f.s. without *any* authority from the Federal Government, but upon their claim of right under the police power of the State. This court held that their rights under the *police power of the State* were *inferior* to the superior rights of the Federal Government, and that in the absence of any Federal authority these defendants could not exceed 4,167 c.f.s. The use made of section 10 in that case was confined to its *first clause*. The second and third clauses and the extent of power under them was not discussed because not involved. It is respectfully urged that this Court is not committed to any construction of the second and third clauses of section 10 by anything said or any principle involved in that case.

On the other hand the Government, through the Attorney General and Solicitor General, urged (Sanitary District v. United States, 266 U. S. 405, 419) that the construction to be placed upon section 10 of the Act of 1899 was:

> *"An Act of Congress is necessary to authorize the creation of an obstruction to the navigable capacity*

of a navigable water of the United States; for a modification of the condition or use, of such navigable water *not amounting to an obstruction,* the recommendation of the Chief of Engineers and the authorization of the Secretary of War are necessary. Hubbard v. Fort, 188 Fed. 987; West Chicago R. R. Co. v. Chicago, 201 U. S. 506; Distinguishing Maine Water Company v. Knickerbocker Company, 99 Me. 473."

Inasmuch as the Government took this position, and this Court held with the Government, how can it be said that this Court construed section 10 in any different light? In that case the first clause was held to prohibit obstructions. How then can it be claimed that the second and third clauses were either construed, or if so, to delegate any authority to change the rule announced by congress in the first clause? Rather it would appear that the Government was sustained when taking the same position that complainant now urges.

The Maine Water Company case (used by the Special Master as his sole authority for construction of section 10) was distinguished by the Government. Hence the case of Sanitary District v. United States, *supra,* would appear to be an authority for Complainant's construction of this section, and particularly in view of this court's language at page 429:

"It (Act of March 3, 1899) is a broad expression of policy in unmistakable terms, advancing upon an earlier act of September 19, 1890, etc."

Since the holding of this court in that case defendants have abstracted more than twice the amount there involved, (now abstracting at least 8,500 c.f.s.) What may have appeared to the Secretary of War as being a diversion not constituting an obstruction to navigable capacity (4,167 c.f.s.)surely cannot justify the taking of more than

twice as much water, which now, without question, substantially obstructs navigation upon the whole of the Great Lakes-St. Lawrence Waterway System. A diversion not amounting to an obstruction might be regulated by the Secretary of War, but when it becomes an obstruction to navigable capacity, his power to authorize ceases and the power of Congress becomes exclusive. Hence Sanitary District vs. United States, *supra,* cannot be cited to sustain an "affirmative authorization" which has never been given by Congress.

d. THE FACT THAT CONGRESS DID NOT ACT TO DISAPPROVE THE SECRETARY OF WAR'S PERMIT OF MARCH 3, 1925, DOES NOT CONSTITUTE AN "AFFIRMATIVE ACT OF CONGRESS" NOR A DELEGATION OF POWER BY IMPLICATION; LEGISLATIVE POWER CANNOT BE IMPLIED SO AS TO BE EXERCISED BY ANOTHER DEPARTMENT OF GOVERNMENT.

In his report the Special Master Says: (M. R. 186, 187)

> "While, as I have said, Congress did not directly authorize the diversion, it was fully conversant with what had been done by the Sanitary District and with what had been permitted by the Secretary of War purporting to act under the general authority conferred by Congress in Section 10 of the Act of March 3, 1899, and it may be regarded as significant that Congress, having complete control, all the permits of the Secretary of War being subject to its action, did not at any time adopt measures either to prevent the diversion or to manifest disapproval of the construction which the Secretary of War had placed upon the statute."

This so-called aid to construction assumes first that Congress was aware that the diversion amounted to an

obstruction to navigable capacity, and that it desired the obstruction to continue. That Congress was "conversant with what had been done" is fully as consonant with *disapproval* as with *approval*, because by Section 10 of the Act of March 3, 1899, Congress had exerted itself to the limit to *prohibit all obstructions to navigable capacity*. It could do no more. The enforcement of this prohibition remained with the executive department and the *courts* and not with Congress. The fact that Congress did not act affirmatively cannot be interpreted as giving "affirmative" authority to do that which it had sweepingly prohibited in the beginning. The *express prohibition* of any right to authorize obstructions *does not give that right by implication.*

We are not unmindful of the rule established in some cases, such as United States v. Midwest Oil Company, 236 U. S. 459, in which it was held that long continued practice to withdraw public lands operated as a grant of implied power. But it will be noticed that in no case is any rule established that where Congress has prohibited certain action by an executive department, authority to do the act is implied from an express prohibition. And also in such cases, as was ably pointed out in the dissenting opinion in United States v. Midwest Oil Company, *supra*, the decisions upholding the withdrawal of public land were in pursuance of a policy declared by Congress, or in cases where grants of Congress were in conflict. Also it will be noticed that these decisions were for the preservation of rights of the government and not in derogation thereof.

The Constitution of the United States contains no prohibitive clause against the exercise of powers by one department of the government belonging to another, and yet it is held that the powers confided to one of the de-

partments cannot be exercised by any other. Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377.

Nor when express ratification is asked and refused, can any power by implication be fairly inferred.

Barden v. No. Pacific R. Co. 154 U. S. 288, 317; 38 L. Ed. 992, 998;
Durousseau v. United States, 6 Cranch. 307, 318; 3 L. Ed. 232, 235;
Eyster v. Centennial Bd. of Finance, 94 U. S. 500, 503; 24 L. Ed. 188, 189.

From this we extract the principle that the grant of authority to the legislative department of the government ought not to be amplified by judicial decision. Congress should not be held to have delegated a power to the war department by implication, simply because it did not act at all after its express prohibition in the act of March 3, 1899.

e. AFFIRMATIVE AUTHORIZATION CANNOT BE IMPLIED FROM SECTION 10 OF THE ACT OF MARCH 3, 1899, BY SUPPLYING AND READING INTO THAT SECTION THE WORD "UNREASONABLE" SO AS TO MODIFY THE EXPRESS PROHIBITION AGAINST OBSTRUCTIONS TO NAVIGABLE CAPACITY.

The Special Master says: (M. R. 190)

"The true intent of the Act of Congress was that *unreasonable* obstructions to navigation, and navigable capacity, were prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an *unreasonable* obstruction."

From the foregoing language the Special Master endeavors not only to read out of section 10 the term *"affirmatively authorized by Congress"* and substitute in its place *"affirmatively authorized by the Secretary of War,"* but also to read into the section the word *"unreasonable"* with reference to obstructions to navigation.

Had Congress intended to say "reasonable" or "unreasonable" it surely could have done so and if Congress had intended any such result the sweeping prohibition of section 10 would certainly not have been used. The section declares the *sole power over obstructions* rests with *Congress,* and whether they are *reasonable* or *unreasonable* is a matter for *Congress' determination* and is not delegated to the Secretary of War.

Indeed the Special Master has adopted a rather narrow construction of section ten to effect the grant of a power by reading into it the word "unreasonable", when that section consists of *language of restriction.* Upon this subject this Court in Fairbank vs. United States, 181 U. S. 283, 288, aptly said:

> "It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed."

In section 18 of the same act of March 3, 1899 (30 Stat. at L. 1121, 1153, Ch. 425, U. S. Comp. Stat. p. 3545) Congress used the term "unreasonable obstructions" in connection with the determination of the Secretary of War, respecting the bringing of criminal actions in cases of bridges, making it the duty of the Secretary of War to insist on certain proceedings whenever he,—

> "Shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable

waterways of the United States, is an *unreasonable* obstruction to the free navigation of such water * * *"

The insertion of the word "*unreasonable*" was of course consciously done and directed the Secretary of War to consider certain conflicting interests of commerce respecting the use of the river and the use of the bridge as related to each other. The fact that the word "*unreasonable*" was specifically employed in the case of the bridges and consciously *used by Congress in section 18 of the same Act*, strengthens the construction urged by complainants that it is *not* to be read into section 10 when it is *not* there.

It is a general principle of interpretation that the mention of one thing implies the exclusion of another. (Expressio unius est exclusio alterius.)

United States v. Arredondo, 6 Pet. 691;
Sturges v. Draper, 12 Wall. 19;
Arthur v. Cunning, 91 U. S. 362;
Walla Walla v. Walla Walla Water Co. 172 U. S. 1.

It would amount to judicial legislation to read into this section something which is not there and which was not intended by Congress.

Courts have no legislative powers and cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself; to depart from the meaning expressed by the legislature is to alter the statute, to legislate and not to interpret.

United States v. Detroit First National Bank, 234 U. S. 245; 58 L. Ed. 1298;
United States v. Goldenberg, 168 U. S. 97; 42 L. Ed. 394;
United States v. Lexington Mill Co. 232 U. S. 399.

In adopting section 10 Congress had the same opportunity to use the word "unreasonable" that it had in section 18 of the same act. Its use in section 18 implies that the failure to use such term in section 10 was a desire on the part of Congress not to delegate any authority to the Secretary of War or anyone else, including State Governments, to determine the reasonableness or unreasonableness of obstructions to navigation, but to retain that power in Congress.

(f) *Section 10 of the Act of March 3, 1899, is not in and of itself an affirmative act of Congress delegating authority to the Secretary of War in cases under the second and third clauses of that section; this statute operates prospectively.*

The Special Master, in his report (M. R. 182) says:

> "In the cases described in the second and third clauses of Section 10, Congress has given its affirmative authorization provided the requirements as to the recommendation of the Chief of Engineers and the authorization of the Secretary of War are met."

This argument assumes that the requirement of the first clause of section 10:

> "that the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited"

being followed by two clauses giving limited authority to the Secretary of War is an "affirmative act of Congress," as respects everything mentioned in these clauses.

We respectively contend that no such construction can be placed upon the sweeping prohibition of the first

clause of section 10. Congress contemplated an *act of Congress.* Its language is prospective. It did not contemplate that the *very act prohibiting obstructions to navigation should constitute an "affirmative act of Congress"* to permit them. A positive prohibition is not an affirmative authorization. The language of Congress in section 10 is prospective. The word *"creation"* suggests any *future* creation, as contrasted with "maintenance" used in the previous Act of Sept. 19, 1890, and which was held in United States vs. Wishkah Boom Co. 136 Fed. 42, 45, not to be repealed because not inconsistent with the prohibition against "creation" in the later act.

Even though the legislature may have the power to enact retrospective laws, a construction which gives to a statute a retroactive operation is not favored. There is always a *presumption* that statutes are intended to operate *prospectively only.*

Reynolds vs. M'Arthur, 2 Pet. 417;
Twenty Per Cent Cases, 20 Wall. 179;
Cameron vs. United States, 231 U. S. 710;
United States Fidelity, etc. v. United States, 209 U. S. 306.

If Congress intended to delegate discretionary authority to the Secretary of War in all of the cases mentioned in the second and third clauses of section ten then his authority would be without limit in the field of obstructions to navigable capacity and there would be no good reason for enacting the first clause. About the only works not mentioned in these clauses are bridges which were included in a separate section which *did* give fact-determining discretion to the Secretary of War in cases of bridges.

Is it not more consonant with the intention of Congress that section 10 was *prospective* entirely? This

Court in Sanitary District vs. United States, 266 U. S. 405, 429, said:

> "* * * It (section 10) is applied *prospectively* to the water henceforth to be withdrawn."

In like manner is it not more in harmony with the intent of Congress to say:

> It (section 10) is applied prospectively to the prohibition of all obstructions unless Congress in the future may authorize them?

(g) *The Maine Water Company Case is distinguishable.*

The Special Master cites the case of Maine Water Co. vs. Knickerbocker Steam Towage Co. 99 Me. 473, in support of his conclusion. Reference to that case discloses that the Supreme Court of Maine utterly failed to consider that in the Act of September 19, 1890, the effect of the combined provisions of sections 7 and 10 gave the same results that the Maine court thought could not have been intended in the Act of March 3, 1899. The structures covered by Section 7 of the early act could be authorized by the Secretary of War *if they did not constitute obstructions*. If, on the other hand, they did constitute obstructions, they were forbidden by section 10 unless "affirmatively authorized by law". The conclusion of the Maine court wholly disregards the word *affirmatively*" and renders it meaningless, useless and without purpose. The result of the Maine holding is to substitute the word "impliedly" for "affirmatively" and to substitute the terms "affirmatively authorized by the Secretary of War" in place of "affirmatively authorized by Congress", in the first clause of section 10.

The Special Master endeavors to support his conclusion by the following reasoning: (M. R. 181, 182)

> "If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress, as in the absence of that, it would always be a judicial question whether there was an obstruction to navigable capacity, and if there were, the action of the Chief of Engineers and the Secretary of War would be without authority. Unless Congress had acted specifically, every such question would be thrown into the courts and the administrative authority of the Secretary of War which has been regarded as practically essential in the classes of cases described in the second and third clauses of Section 10 would be paralyzed."

The answer to this rests in the numerous acts passed by Congress since March 3, 1899, specifically acting upon questions involving obstructions to navigation in isolated ports, harbors and rivers throughout the length and breadth of its jurisdiction. If Congress intended in 1899 to delegate to the Secretary of War its broad power over obstructions to navigation, why would Congress go on after that time, continually authorizing certain obstructions by affirmative acts, in numerous cases, and why was it necessary in all of these acts for Congress to expressly use such terms as "the Secretary of War is hereby authorized and empowered"; "The Secretary of War shall have power and he is hereby authorized and directed"; "the Secretary of War is hereby authorized in his discretion", etc., in cases involving obstructions to navigation which are infinitesimal in comparison with the enormous obstruction here involved!

At the present time with Congress in session the attention of this Court is respectfully directed to the hundreds of bills now pending to provide affirmative authorization by Congress for the construction of bridges over rivers, rivulets and streams throughout the length and breadth of the nation, and authorizing the Secretary of War to approve the construction of countless works which come under the second and third clauses of section 10, as well as sections 11 and 18 of the Act of March 3, 1899.

In particular the court is asked to take judicial notice of the following pending bills before the 70th Session of Congress, which are typical of the hundreds of similar measures acted upon by each session of Congress.

H. R. 6512—Bridge across Little Calumet River near Wentworth Avenue, Chicago.
H. R. 6513—Bridge across Little Calumet River near Ashland Avenue, Chicago.
H. R. 6514—Bridge across Little Calumet River near Indiana Avenue, Chicago.
H. R. 8740—Bridge across Little Calumet River, Chicago.
S. 2811—Bridge across Little Calumet River, Chicago.
S. 2812—Bridge across Little Calumet River, Chicago.
S. 2813—Bridge across Little Calumet River, Chicago.

For these apparently inconsequential "obstructions to navigable capacity" and upon one of the "tributaries" of the Chicago Sanitary Canal, the affirmative authority of Congress is being sought. Evidently it is not too inconsequential for Congress to deal with these small regulatory measures, but the Maine Water Company case would lead us to the conclusion that it is too much to require Congress to deal with a measure involving

changes in the levels of the Great Lakes and their connecting water ways, constituting a substantial obstruction to the navigable capacity of 400 harbors, at least 100 of which have been improved at an expense of more than eighty million dollars to the Federal Government, damaging commerce and navigation at least three million dollars per year, affecting fishing and hunting grounds, beaches at summer resorts, public parks, wharves, docks, and all riparian property of the State of Michigan and sister states bordering upon the Great Lakes, and directly affecting an industrial and commercial civilization that has grown up largely dependent upon these water ways for its continuance. It seems incredible that any view could be adopted to the effect that Congress intended to empower the Secretary of War, to authorize within his discretion obstructions to the navigable capacity of the Great Lakes which might cause all of this damage and in addition affect international relations with Canada on the other side of this great international waterway, and yet did not intend to give discretionary authority to the Secretary of War to affirmatively authorize the construction of bridges over streams, dredging harbors, dumping refuse, and other countless matters of relatively small importance.

As to the action of previous sessions of Congress reference is made particularly to such acts as, section 11 of the Act of March 3, 1899:

> "where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, *he may, and is hereby, authorized* to cause such lands to be established beyond which no piers, wharves, bulkheads, or other works shall be extended, or deposits made, except under regulations as may be prescribed from time to time by him: Provided, etc."

Section 13 of the Act of March 3, 1899:

"* * * And provided, further, that *the Secretary of War, whenever in the judgment of the Chief of Engineers,* anchorage and navigation will not be injured thereby, *may permit* the deposit of any material above mentioned in navigable waters, within the limits to be defined and under conditions to be prescribed by him. * * *"

Section 14 of the Act of March 3, 1899:

"* * * Provided, that *the Secretary of War may, on a recommendation of the Chief of Engineers, grant permission* for the temporary occupation or use of any of the aforementioned public works, *when in his judgment* such occupation or use will not be injurious to the public interests".

Section 18 of the Act of March 3, 1899:

"That *whenever the Secretary of War shall have good reason to believe* that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States, *is an unreasonable obstruction* to the free navigation of such country, on account of insufficient height, etc., it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard * * * to notify the United States District Attorney or the District in which such bridge is situated, to the end that the criminal proceeding hereafter mentioned may be taken."

Section 5 of the Act of August 26, 1912:

"*The Secretary of War is hereby authorized in his discretion,* to modify and extend harbor lines in front of the City of Chicago in such a manner as to permit, park extension work, which may be desired by the municipal authorities, including the changing and widening of the southern entrance to the Chicago Harbor."

We pause long enough to suggest that if an affirmative act of Congress was deemed necessary to authorize the Secretary of War to have this power with reference to the *Chicago Harbor,* how much greater were the necessities for an affirmative act of Congress with respect to the creation of an obstruction to *four hundred other harbors upon the Great Lakes,* and the taking of such an enormous quantity of water that a substantial obstruction to navigation was caused throughout this great chain of water ways? If Congress deemed it necessary in 1912 to give authority to the Secretary of War upon this comparatively insignificant matter, how can it be said that Congress had already affirmatively given much broader powers by the Act of 1899 and had so intended without further affirmative action?

Section 14 of the Act of March 26, 1908:

> "*The Secretary of War is hereby authorized* to fix and establish pierhead and bulkhead lines, either or both, in the harbor of San Pedro."

Act of July 27, 1916:

> "*The Secretary of War is hereby authorized and directed* to fix and establish pierhead and bulkhead lines, either or both, in New Port Harbor, California, etc."

Section 4, Act of March 3, 1905:

> "*The Secretary of War is hereby authorized and empowered* to prescribe regulations to govern the transportation and dumping into any navigable water, or waters adjacent thereto, of dredgings, earth, garbage, and other refuse materials of every kind or description, whenever in his judgment such regulations are required in the interests of navigation."

We call the court's attention to the fact that Congress considered it necessary in 1905, to act affirmatively to authorize even such possible obstructions to navigation as the dumping of refuse. How much more is needed to show that section 10 of the Act of March 3, 1899, was not intended nor construed by congress itself as authorizing obstructions to navigation by any delegated power claimed to reside in the Secretary of War?

Section 2 of the Act of May 9, 1900:

> "*The Secretary of War shall have power, and he is hereby authorized and directed,* within the shortest practicable time after the passage hereof, to prescribe rules and regulations, which he may at any time modify to cover and regulate the floating of loose timber and logs, etc."

Section 5, Act of March 3, 1909:

> "That the Secretary of War, be, and is hereby, authorized to make such rules and regulations for the navigation of the south and southwest passes of the Mississippi River, as to him shall seem necessary or expedient for the purpose of preventing any obstructions to the channels through said south and southwest passes and any injury to the works therein constructed, etc."

Section 1, Act of March 4, 1913:

> "Improving New York harbor, New York. * * * And the Secretary of War is hereby authorized to make such rules and regulations for the navigation of Ambrose Channel, etc."

Section 1, Chapter 436, Act of June 25, 1910:

> "The consent of Congress is hereby given to the city of New York in the State of New York, to ob-

struct navigation of any river or other water way which does not form a connecting link between other navigable waters of the United States, etc. Provided, however, that any such obstruction shall be unlawful unless the location and plans for the proposed work, or works, before the commencement thereof, shall have been filed with and approved by the Secretary of War and Chief of Engineers."

This act of June 25, 1910, illustrates that Congress at that time, not deeming that the act of March 3, 1899 delegated authority over obstructions to navigation, saw fit to pass an affirmative act to permit these obstructions to navigation. The regulatory details were to be administered by the Secretary of War. *This act is the kind of act intended by Congress to precede the creation of any obstruction to navigation.* In this act we find illustrated the intention of Congress as to the true construction of section 10 of the Act of March 3, 1899.

None of these works of construction can be done without cost. The money to defray them must be appropriated by Congress, and would constitute express authorization to do the work. This was undoubtedly the manner contemplated by Congress when it expressly prohibited obstructions being created without its affirmative authorization. These acts illustrate even better than the language of section 10 the construction which Congress placed upon its own act.

H. SECTION 10 SHOULD NOT RECEIVE A CONSTRUCTION DELEGATING DISCRETIONARY POWER TO THE SECRETARY OF WAR TO AUTHORIZE OBSTRUCTIONS TO NAVIGABLE CAPACITY BECAUSE SUCH POWER NECESSARILY INCLUDES THE POWER OF EMINENT DOMAIN WHICH CANNOT BE DELEGATED UNLESS IT AFFIRMATIVELY APPEARS FROM ACTION BY CONGRESS.

The Special Master says (M. R. 191):

> "And when the Secretary of War acts under the authority conferred by Congress, *his determination as to what is or is not an unreasonable obstruction to navigation or navigable capacity in the circumstances of the particular case has the same effect and is as immune from judicial review as if Congress had acted directly.*"

This construction would clothe the Secretary of War with power to authorize obstructions to navigable capacity *within his discretion.* Being "*immune from judicial review*" it would necessarily be *conclusive* in its effect.

1. *Discretionary power to authorize obstructions to navigable capacity necessarily includes the power of eminent domain.*

Discretionary power over obstructions would necessarily include the power of eminent domain because in the exercise of discretion the Secretary of War would be empowered to authorize a class of obstructions which would involve the taking of private property for public use for the purpose of navigation.

> Monongahela Navigation Co. v. United States, 148 U. S. 312; 37 L. Ed. 463;
> Southern Pacific Co. v. Olympian Dredging Co., 260 U. S. 205, 210;
> Scranton v. Wheeler, 179 U. S. 141; 45 L. Ed. 126;
> United States v. Lynah, 188 U. S. 445; 45 L. Ed. 539;
> United States v. Cress, 243 U. S. 316, 61 L. Ed. 746.

Whatever may be the opinion of this Court with respect to the effect of the Chicago diversion upon the property rights of complainant and its people in this case, as to whether the power of eminent domain has been exercised or whether the damage is *damnum absque injuria,* nevertheless the power of the Secretary of War, if discretionary, would include in other cases the whole power of Congress to deal with obstruc-

tions, which necessarily includes the power of eminent domain whenever it is required to be exercised.

The determination in a given case whether the obstruction is *damnum absque injuria* or amounts to a "taking" of private property for which compensation must be made, is for the Courts. But the determination to do the act which amounts to the exercise of the power of eminent domain would (if discretionary) be one for the Secretary of War.

2. *The delegation of the power of eminent domain must plain'y appear.*

> "The right to take private property in any form without the consent of the owner is a high prerogative of sovereignty, which no individual or corporation can exercise without an express grant. The power may be delegated but the delegation must plainly appear."
>
> 2 Sutherland on Stat. Const. 2d ed. 1940.

> "Inasmuch as the right of eminent domain is one which lies dormant in the State until legislative action is had, pointing out the occasion, mode, conditions and agencies for its exercise, the right to exercise the power must be conferred by statute, either in express words or by necessary implication.
>
> The power should not be gathered from doubtful inferences but should be unmistakably expressed."
>
> 20 Corpus Juris 533, 534.

United States v. Gettysburg Elect. R. Co. 160 U. S. 668; 40 L. Ed. 576;
Newport & Cinn. Bridge Co. v. U. S. 105 U. S. 470;
Fairbanks v. U. S. 181 U. S. 283;
Western Union Telegraph Co. v. Atlanta R. Co. 227 Fed. 465;
Western Union Telegraph Co. v. Penn. R. Co. 195 U. S. 540, 549; 49 L. Ed. 312, 332;
United States v. Rauers 70 Fed. 748;
Washington Water Power Co. v. Waters, 186 Fed. 572;
Miocene Ditch Co. v. Lyng, 138 Fed. 544.

3. *No such plain legislation to delegate the power of eminent domain appears in section 10 giving the Secretary of War power to authorize obstructions.*

Besides the plain and *unmistakable prohibition* in section 10 against creating any obstructions without affirmative authority from Congress it is clear that the War Department itself never believed it had the broad discretionary power of Congress, including the power of eminent domain. This feeling was expressed by the Secretary of War (M. R. 64) when on January 8, 1913, he said among other things:

> "The weighing of the sanitation and possibly the health of one locality over against the commerce of the rest of the Nation, and the consideration of our relations and obligations to Canada in respect to a great international waterway, *are not matters of mere technical or scientific deduction. They are quite different in character, for example, from the question of fixing the proper location of a pierhead line or the height or width of a drawbridge over a navigable stream—fair samples of the class of questions which come to the Secretary of War for decision under the above-mentioned Act of 1899.* While the researches and opinions of experts in the respective fields are necessary and useful as an assistance towards reaching a fair and proper policy, the final determination of that policy should belong, not to an administrative officer, but rather to those bodies to whom we are accustomed to entrust the making of our laws and treaties."

9. THE ORDINANCE OF 1787 PROHIBITS INTERFERENCE WITH THE NAVIGABLE CAPACITY OF THE GREAT LAKES; CONGRESS DID NOT INTEND SECTION 10 OF THE ACT OF MARCH 3, 1899 TO MODIFY OR REPEAL THE PROHIBITION OF THIS COMPACT.

Article 4 of the Ordinance of 1787 (1 Stat. at L. 51 and 52; U. S. Rev. Stat. 1878, Ed. pp. 13, 16) provides as follows:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, etc."

In Pennsylvania v. Wheeling Bridge Company, 13 How. 518, 566, this court said:

"This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?"

In Economy Light & Power Company v. United States, 256 U. S. 113, 120, it was said:

"But, so far as it established public rights of highway in navigable waters, capable of bearing commerce from State to State, it did not regulate internal affairs alone, and was no more capable of repeal by one of the States than any other regulation of interstate commerce enacted by the Congress; being analogous in this respect to legislation enacted under the exclusive power of Congress to regulate commerce with the Indian tribes."

From these cases it is clear that the ordinance of 1787 applies to the navigable waters of the Great Lakes and has always been in force. The Ordinance of 1787 has been reiterated in later acts of Congress, accepted by the States of Illinois, Ohio, Wisconsin and Michigan, in their constitutions, and was in force at the time of the passage of both the Acts of September 19, 1890 and the Act of March 3, 1899, and is the law of the land.

In view of the ordinance of 1787 can it be said that Congress intended by section 10 to delegate power to the Secretary of War to repeal or modify this ancient compact, without an affirmative act of Congress expressing such an intention? Section 10 must be construed with reference to the ordinance

of 1787 when applied to the Great Lakes, and any construction of this section which negatives the guarantee of that compact must be clear in its repeal. Whatever this section may mean with respect to *other* navigable waters of the United States, it still remains true that Congress never intended a construction of the Act of March 3, 1899 which would permit obstructions to the navigable capacity of *these particular waters of the Great Lakes,* guaranteed to be kept free and navigable to the fullest extent by the Ordinance of 1787. To construe Section 10 as delegating power over *obstructions to the navigable capacity of the Great Lakes and their connecting waters* would be to derive a *power by implication* to annul or repeal an express act of Congress still in force and effect.

If Section 10 be so construed to repeal or modify this guaranty of the Ordinance of 1787, then in addition to its being a power delegated by implication, it constitutes a repeal by implication of the Ordinance of 1787.

Repeals by implication are not favored and will not be indulged in if there is any other reasonable construction.

Lewis v. United States, 244 U. S. 134;
Washington v. Miller, 235 U. S. 422;
Ex Parte Webb, 255 U. S. 663.

Nor can one act be allowed to defeat another if, by a fair and reasonable construction, the two can be made to stand together.

Washington v. Miller, 235 U. S. 422.

It would be most unreasonable to suppose that a legislative body intended, by doubtful inference, to repeal salutary provisions in a very early statute which, in numerous enactments it has cautiously preserved.

Fussell v. Gregg, 133 U. S. 550.

Even though two statutes are inconsistent the presumption is that the special act is intended to remain in force as an exception to the general act.

Rodgers v. United States, 185 U. S. 83;
Washington v. Miller, 235 U. S. 442;
In Re Louisville Underwriters, 134 U. S. 488.

Section 10 should not receive a construction repealing or changing the guarantee of the Ordinance of 1787, at least so far as it applies to the Great Lakes and their connecting waters.

10. TO CONSTRUE SECTION 10 OF THE ACT OF MARCH 3, 1899, AS GIVING THE SECRETARY OF WAR FULL AUTHORITY TO AUTHORIZE THIS DIVERSION WITHOUT AN AFFIRMATIVE ACT OF CONGRESS, IS NOT JUSTIFIED IN LIGHT OF INTERNATIONAL RELATIONS WITH CANADA, INCLUDING TREATIES AND KINDRED ACTS OF CONGRESS.

The power of Congress over commerce includes the power:

"To regulate commerce with foreign nations. * *"

By Article II, Sec. (2) Clause 2, of the Federal Constitution, it is provided that:

"He (the president) shall have Power, by and with the Advice and Consent of the Senate, to make treaties. * *"

By Article VI, Sec. (2), of the Federal Constitution, it is provided:

"* * All treaties made or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; * * *".

Regardless, for the moment, of the construction of section 10 that may be urged, concerning an obstruction to navigation affecting two sister states in inter-state waters, can it be that by section 10, Ccngress intended to include the delegation of even broader powers, i.e., power to authorize the creation and mantenance of obstructions to navigation in *international waters* which affect a *foreign nation,—without an affirmative act of Congress?*

The power of Congress extends to the exclusive control of interstate and *a fortiori* to international waterways.

United States vs. Rio Grande Dam & Irrig. Co. 174 U. S. 690;
Kansas v. Colorado 206 U. S. 46;
Sanitary District v. United States 266 U. S. 405;
United States v. Chandler-Dunbar Water Co. 229 U. S. 54.

If Section 10 be so construed as to give to the Secretary of War these rights which anciently reposed in Congress and the President, it means that acts which involve international waterways and "commerce with foreign nations" and require the action of Congress, acts which involve treaty-making power, which should be counseled by the Senate, and acts which may lead to international complications and even to war itself—may be accomplished by the Secretary of War without an affirmative act of Congress. If this construction were to be urged with regard to any other *foreign nation*, than our friendly neighbor Canada, the effect might be even more significant. How can it be said that Congress ever intended to affirmatively authorize the Secretary of War to have power through section 10 to accomplish this result? *Certainly it cannot be found in section 10 itself, nor in any of the treaties with the Dominion Government, nor in any of the acts of Congress dealing with this question.*

(a) *Canada as a sovereign nation has a right to its portion of the international water ways, including the Great Lakes*

and St. Lawrence River, without restriction, except by treaty.

In Vattell Law of Nations, introd. par. 18, it is said:

> "A small republic is no less a sovereign state than the most powerful kingdom."

In Re The Antelope, 10 Wheat. 66, 122, Justice Marshall said:

> "No principle of general law is more universally acknowledged than the perfect equality of nations."

In Re The Schooner Exchange v. M'Fadden, et al., 7 Cranch 116, 3 L. Ed. 114, 116 Justice Marshall again said:

> "This perfect equality and absolute independence of sovereignty * * *"

> "The jurisdiction of a nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitations not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."

As a necessary corollary of international sovereignty, one nation would have no right to perform an act or to permit it to be done by its own political subdivisions or its nationals without its express or clearly implied consent or approval, the direct, natural and necessary result of which is to infringe upon, injure, impair or destroy the rights of property of another equal, independent, sovereign nation, or the rights of property of another equal independent sovereign nation, or the rights of property of its nationals, or of those under its jurisdiction and control. Such an injury to the rights of another sovereign nation, if persisted in, constitutes a proper ground for diplomatic interposition and protest and may constitute a just cause for war.

In matters where the national importance is imminent and direct even where Congress is silent the States may not act.

Kansas City So. Ry. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75.

(b) The Canadian Boundary Waters Treaty of 1909 did not contemplate authorization to take these international waters nor the delegation of authority to the Secretary of War to permit such diversion.

It has been intimated that this treaty did not contemplate the waters of Lake Michigan. But it was found by the Special Master (M. R. 87, 89, 101) that the levels of Lakes Michigan and Huron were the same, that the diversion affected them equally, and for all practical purposes they were one reservoir.

The Canadian Boundary Waters Treaty of January 11, 1909, provided in part as follows:

> Art. 1. "* * * It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan, and to all canals, connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. * * *"
>
> Art. 2. "* * * It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision, to surrender any right which it may have, to object to any interference with or diversions of water on the other side of the boundary, the effect of which would be productive of material injury to the navigation interests on its own side of the boundary."
>
> Art. 3. "It is agreed that in addition to the uses, obstructions, and diversions, heretofore permitted or hereafter provided for by special agreement by the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United

States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission. * * *"

It will be noticed from the foregoing Article 2 that Canada *did not surrender any right to object to any interference, which would be productive of material injury to the navigation interests on its own side of the boundary.* Can it be successfully argued in view of this international expression that Congress intended to delegate authority to the Secretary of War to create an obstruction to navigation on the Great Lakes that would extend to our international neighbor, Canada,—and this without an affirmative act of Congress? If so, this is going far beyond the delegation of regulation-making power to the Secretary of War and places within his hands treaty making powers, which repose in the president of the United States by and with the advice and consent of the Senate, (Art. II, Sec. 2, Clause 2, Federal Constitution) because the power to modify a treaty presupposes the power to make one. Surely no such broad power was ever intended by Congress in enacting section 10 of the Act of March 3, 1899. And surely no such extensive power was recognized by the Federal Government in this treaty of 1909.

Under the Boundary Waters Treaty of 1909, it was no more possible to divert waters with immunity from Lake Michigan than for Canada to divert waters from the Georgian Bay so as to *affect* boundary waters. If Lake Michigan is not treated as a *boundary water,* but as an arm or bay connecting with a boundary water, what difference does this overnice distinction make when a boundary water (Lake Huron) is affected? This Court in Sanitary District vs. United States, 266 U. S. 405, 425, thought this treaty applied to diversions *which affect boundary waters* when it said:

"It (the Government) has a standing in this suit not only to remove obstruction to interstate and foreign com-

merce, the main ground, which we will deal with last, *but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned,* and, it may be, also on the footing of an ultimate sovereign interest in the Lakes. * * * *With regard to the second ground, the Treaty of January 11, 1909, with Great Britain, expressly provides against uses 'affecting the natural flow of boundary waters' without authority of the United States or the Dominion of Canada within their respective jurisdictions and the approval of the International Joint Commission agreed upon therein.*"

(c) *The Treaty of 1909 bears the same construction as should be given by the Courts to section 10 of the Act of March 3, 1899.*

Article 3, provides that the respective governments were not intended to be limited in their right to construct breakwaters, improve harbors, and other governmental works,

> "for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other."

By the treaty certain works *for the benefit of commerce and navigation,* and the use of water in its *ordinary use* are not changed or interfered with, but the use of water so as *to materially affect the level or flow of boundary waters is* especially denied.

The Special Master says: (M. R. 189)

> "* * * the treaty contains nothing which can be regarded as effecting a repeal of the Act of March 3, 1899, or as operating to deprive the Secretary of War of the authority it conferred in relation to the diversion here in question."

The question is not whether the treaty *repeals* the act of March 3, 1899, but whether section 10 of the Act of March 3, 1899 can be construed as delegating power to the Secretary

of War to permit obstructions to navigable capacity in the *Great Lakes in view of the treaty of January 11, 1909, with Canada.*

It will be noticed that by that treaty, works which were beneficial to navigation—such as the construction of breakwaters, improvement of harbors, and the like (included in clauses two and three of section 10) were permitted upon regulation. Either Government retained power to regulate through its administrative officers; but those acts which constituted *a change in the level or flow of the boundary waters,* which constituted an obstruction to navigation (included in clause one of sec. 10) were expressly reserved and denied by the treaty. In other words, the Canadian Boundary Water Treaty of 1909 *bears the same construction that is here urged with respect to section 10 by complainant.* The treaty and section 10 both provided that obstructions to navigation, such as the lowering of levels of the Great Lakes, should require further *affirmative* dealing on the part of the Governments themselves, and only those matters "for the benefit of commerce and navigation" rested within regulatory and administrative control. Thus the power of Canada over "the level or flow" of its portion of the Great Lakes was reserved, and was intended to be dealt with by further international agreement, should this be desired. *Congress was expected to deal with problems concerning the "level and flow" of the Great Lakes.* In view of this international situation, how can the previous act of March 3, 1899 be construed as delegating full power to the Secretary of War to affect "the level or flow" of the Great Lakes, and thus authorize obstructions, which was a subject expressly reserved to the treaty or law-making power of the respective governments?

(d) *The Act of Congress, Niagara Falls Act, June 29, 1906, does not contemplate a construction of section 10, giving extensive delegated power to the Secretary of War.*

The Special Master says: (M. R. 188)

"I find nothing in the Niagara Falls Act which can be deemed to indicate disapprobation by Congress of the construction by the Secretary of War of his authority under the Act of 1899; whatever inference may be drawn from the act seems to me to be to the contrary."

The Niagara Falls Act of June 29, 1906, provided in part:

"Provided, That this prohibition shall not be interpreted as forbidding the diversion of the waters of the Great Lakes or of Niagara River for sanitary or domestic purposes, or for navigation, the amount of which may be fixed from time to time by the Congress of the United States or by the Secretary of War of the United States *under its direction.*" (M. R. 46, 47.)

If the previous act of March 3, 1899, bore the construction by Congress that the Secretary of War was invested with full power, to authorize diversion from the Great Lakes and St. Lawrence waterways, then why, it may be asked, did Congress deal with this same subject at all in 1906, or if it decided to act, then why did it deem it necessary to grant power to the Secretary of War to act "under its direction" if a still broader power already had been delegated to him by its act of 1899? In all other diversions the Secretary of War, by such a construction of section 10, would have extensive unlimited, discretionary authority, yet here Congress thought it was necessary to pass an affirmative act for the purpose of delegating much more *limited authority.* Surely the Act of 1906 does not show that Congress ever recognized a delegation of such broad power to the Secretary of War by the earlier act of March 3, 1899, as to authorize obstructions to navigation on the Great Lakes.

(e) *A general consideration of American-Canadian relationships does not justify the conclusion that Congress intended such a construction of section 10 as to include this particular diversion and obstruction in international waters.*

Ford vs. Steamship Co. 102 U. S. 541;
Henderson vs. Mayor of New York, 92 U. S. 259.

In United States v. Chandler-Dunbar Co., 229 U. S. 53, 67, this court said:

> "This was a matter of international consideration, for Canada, as well as the United States, was interested in the control and regulation of the Lake water levels."

This controversy involves international waters between Canada and our country, and is of a legislative nature, necessitating legislative determination as to the position of the United States, respecting the Great Lakes. This is not a controversy between sister cities on an intrastate stream, or even between sister states on an interstate waterway, but a controversy between *two separate nations* on an *international frontier of waterways.* Whatever may be thought about the Secretary of War's power under section 10 with respect to intrastate or interstate waterways, *here is a power which Congress never contemplated should be delegated to an administrative officer.*

Most certainly Congress did not *expressly* delegate any such international action under section 10, and *if it be urged by implication,* we point to the fact that this is no trifling power as applied to the facts of this particular case. The Federal constitution contemplates legislative action in matters of international relations. The regulation of commerce with foreign nations is reposed in Congress. The magnitude as well as the nature of the questions involved demand legislative decision, based upon action by representatives from the whole United States. International, war-fraught questions are peculiarly legislative in character. Deliberative and legislative action of a *national* and *international* scope are involved.

To say that this power is to be delegated to an *appointive, administrative officer* by an *ordinary rivers and harbors act* which as a matter of fact expressly reserves to the affirmative action of Congress authorization over obstructions to navigation, is to deny the meaning of the language of the act itself and to place in the hands of this officer, a power not only to permit the Great Lakes to be drained into the Mississippi Valley, but to legislate upon matters of vital and lasting importance respecting two great nations. What can there possibly be in the Act of 1899 that imports a necessity for such broad powers to be delegated to the Secretary of War, in any case, but particularly in a case respecting international relationship with Canada? In fact this very kind of case illustrates *the reason for the express prohibition employed by Congress in prohibiting "the creation of any obstruction not affirmatively authorized by Congress."*

On June 24, 1896, the United States District Engineer at Chicago, in his report (which language was embodied in a later permit) stated:

> "The question that must come up later for the action of the War Department, to-wit, whether the improved channel of Chicago River will be sufficient to carry 300,000 cubic feet of water per minute without lessening or destroying the navigability of Chicago River, or whether the City of Chicago will be allowed by the United States and Great Britain to take any water at all from the Great Lakes, with the inevitable result of lowering their levels, is not now under investigation, and is one that will not probably be settled or decided by executive officers. It is, or may rather be considered an international question." (J. R. 133.)

Can it be possible that Congress intended to delegate its power so that an administrative officer, alone, could disrupt peaceful relations on a three thousand mile frontier upon which not a soldier stands guard? Can it be argued that Congress intended, without a word of debate indicating any

such intention, without reason, logic or necessity, justifying such course to delegate such a power? Certainly a general consideration of the relationship of Canada and the United States does not justify such a strained construction of section 10, as this, when applied to the facts of this particular diversion.

(II) TO CONSTRUE SECTION 10 OF THE ACT OF MARCH 3, 1899, AS DELEGATING POWER TO THE SECRETARY OF WAR TO GRANT EXPRESS AUTHORITY FOR OBSTRUCTIONS TO NAVIGABLE CAPACITY WOULD RENDER THAT SECTION VOID, BECAUSE SUCH A CONSTRUCTION WOULD AMOUNT TO AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

By the first clause of Section 10 Congress laid down the *legislative rule* prohibiting the creation of any obstructions to navigable capacity.

By the third clause of section 10, it was provided:

> "And it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, * * * lake * * *, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War, prior to beginning the same."

a. *Congress, having established the rule of law prohibiting obstructions to navigable capacity, power could be delegated to the Secretary of War to determine facts* but *not to change the general rule.*

Congress established the general rule and the Secretary of War's act was limited to a fact-finding determination in pursuance of this rule. He can neither expand nor contract the law. On this question his judgment cannot be substituted for that of the people's representatives. Hence any

construction of the third clause which attempts to give the Secretary of War the power to authorize and permit obstructions to navigation, would necessarily give power to change the express rule of law laid down by Congress, and thereby would involve an unconstitutional delegation of law-making power.

In such an event, his power would not be confined to the determination of a fact, but would extend to override and change that which Congress had expressly prohibited, i. e. obstructions to navigable capacity.

In St. Louis Merchants Bridge Company v. United States, 188 Fed. Rep. 191, 195, the court said:

> "A legislative body may delegate the power to find some fact or situation on which the operation of a law is conditioned, or to make and enforce regulations for the execution of a statute according to its terms."

> "But it cannot delegate its legislative power, its power to exercise the indispensable discretion to make, to add to, to take from, or to modify the law. 'The true distinction,' said Judge Ranney for the Supreme Court of Ohio, in Cincinnati, Wilmington and Zanesville Railroad Co. v. Commissioners, 1 Ohio St. 77, 88, in a declaration which has been repeatedly approved by the Supreme Court, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made.'"

Power to regulate commerce cannot be delegated.

> Houtenbergh v. Hennick, 129 U. S. 148;
> Robbins v. Shelby Co. 120 U. S. 489;
> Asher v. Texas, 128 U. S. 129;
> Dent v. United States, 71 Pac. Rep. 920;
> U. S. v. Blasingame, 116 Fed. Rep. 654.

Any construction of clause 3 which extends the power of the Secretary of War *beyond the prohibition of obstructions to navigation,* and attempts to give him power to authorize obstructions to navigation, would be an attempt to give him the power to make the law with respect to such obstructions, and not only to determine what amounts to an obstruction in a given case, but to decide whether to prohibit such an obstruction. Such power must of necessity, involve a delegation of law-making power to change the general rule laid down by Congress in the first clause of section 10, and is a violation of the express rule prohibiting obstructions.

This was never contemplated by Article I, Section 1, of the Federal Constitution, which provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States."

The delegation of power by the people to the Federal Government to regulate commerce conferred upon *Congress* plenary power over navigation, including obstructions to navigable capacity. Re-delegation of legislative power by Congress would be void. Congress alone can legislate, and when Congress declares by specific enactment that there shall be no obstructions to navigable capacity, the Secretary of War may receive power to determine the facts as to what constitutes an obstruction in a given case, but cannot go further and *authorize* and make lawful *that which has been declared by Congress to be unlawful.*

We are not unmindful of the cases cited by the Special Master (M. R. 190-191), upholding the power of Congress to make a delegation of fact determination. But in each case referred to, Congress expressly provided the *general rule* and left the determination of facts to the Secretary of War or other officer, with power to enforce the provisions of the law. *Congress* provided the *general rule of law* and the executive or administrative *officer determined* the *facts.*

In the case of Union Bridge Company v. United States, 204 U. S. 364, and the other so-called bridge cases cited by the Special Master (M. R. 190-191), the general rule of law was laid down by Congress, in Section 18 of this same act (March 3, 1899) prohibiting bridges which obstructed navigable capacity, and left with the Secretary of War power to determine in a given case what constituted an obstruction, and to enforce their removal. But this court did not hold that by virtue of his fact-determining power, the Secretary of War could change the rule of law, and determine that obstructive bridges could be authorized, and that he could issue a permit for that purpose. Similarly, in the other cases cited where Congress approved the general rule that articles below a certain standard or of a certain nature should be prohibited, and left the fact-determining power to the Secretary of War, or other officer, to determine what articles came within this classification. The court did not say that the administrative officer had power to change the rule and permit such articles to be excluded within his judgment. His sole power in all of these cases was limited to the finding of the facts and the enforcement of the prohibition under the general rule of law that was laid down by Congress. The officer was the mere agent of the law-making department, to ascertain and declare the event or article upon which its expressed will was to take effect.

But here is a different question entirely from that which was decided in the so-called bridge cases and the other cited cases. *Here the general rule of Congress is expressly stated in the first clause of section 10, prohibiting obstructions to navigable capacity.* The broadest construction possible for the third clause is that the Secretary of War shall be the fact-determining administrative officer to decide what shall come within the prohibition of Congress. To construe this clause so as to give the Secretary of War power to change the rule of law that Congress has adopted, and to affirma-

tively authorize an obstruction to navigable capacity by granting a permit therefor, would be to give that officer law-making power to change the general rule of Congress, and permit obstructions to navigable capacity,—and this in the same section of the statute which prohibits any obstruction to navigable capacity without an affirmative act of Congress. That power necessarily involves legislative determination. It must of necessity require a rule of law to change a rule of law, and especially a rule of law which is in violation of the express law laid down by Congress. That being the case, such a construction of section 10 would involve an unconstitutional delegation of legislative power.

b. Any construction of Section 10 which attempts to confer upon the Secretary of War power to affirmatively authorize obstructions to navigable capacity, would involve a legislative power and thus prove to be an unconstitutional delegation.

Delegation of fact-determining power to prohibit obstructions to navigable capacity does not confer upon the Secretary of War power to give affirmative authority to create obstructions to navigable capacity, whereby property rights of the complainant and others may be invaded and damage inflicted. If any power exists to do this, Congress, legislating on a national basis, is the body which must act to affirmatively authorize obstructions to navigable capacity, and particularly in view of the considerations involved in lowering of levels of the Great Lakes. Accordingly, if the Act of March 3, 1899, be construed to confer upon the Secretary of War this power, it is tantamount to conferring upon that administrative, appointive officer the power to "regulate commerce with foreign nations and among the several states" which has been exclusively delegated by the people to Congress.

It is the theory of our government that all power ultimately resides in the people; that governments derive their just powers from the consent of the governed; that the Constitution of the United States outlined the framework of the

national government; that this Constitution was framed by representatives of the people and at least submitted to the people for adoption. The power then which all public officers of the national government exercise, is power delegated to them by the people, through the Constitution. The legislative power delegated to the Congress of the United States by the Constitution is power derived from the people themselves. There is no direct declaration in the Constitution of the United States of a division of powers, but the Constitution does provide:

a. That all legislative power herein granted shall be vested in the Congress of the United States which shall consist of a Senate and a House of Representatives;

b. All executive power is vested in the President of the United States; and

c. All judicial power is vested in the Supreme Court of the United States and such other courts as Congress may from time to time establish.

Congress by Article I, Section 8, clause 3, of the Constitution, had granted to it the power to regulate commerce, and this power carried with it the power to regulate navigation. The precise question involved is whether, under Section 10 of the Rivers and Harbors Act of March 3, 1899, the Secretary of War has the power delegated to him to lower the level of the Great Lakes by diverting the water therefrom, and this involves the question whether the power exercised by the Secretary of War in its purposes, objects, and results, is a power to regulate commerce or a mere executive power to carry into effect the law framed by Congress.

The lowering of the level of the Great Lakes is an accomplished fact. It occurred by reason of the exercise of the power by the Secretary of War to permit the diversion of the water from the Great Lakes. The lowering of the level of the waters of the Great Lakes is an invasion of the sovereign rights of an adjacent friendly government and might become

a just cause for war. It is a violation of the international obligations of the United States with a foreign friendly government consummated by a treaty entered into between the respective sovereignties, and the violation of such international obligation would be a just cause for war.

The lowering of the level of the waters of the Great Lakes constitutes an obstruction to navigation and that navigation is navigation used and essential to be used in foreign and interstate commerce, the power to regulate which is vested in the Congress of the United States. The power to lower the level of the waters of the Great Lakes or to authorize their lowering, to violate the international obligations of the United States and to interfere with and obstruct intrastate, interstate and foreign commerce is a power necessarily *legislative* in character. It has to do with the policy of the United States government toward commerce and foreign nations. It is the determination of a matter of national policy which requires consideration and deliberation. The power, being legislative in character, is such a power as is held in trust by the Congress of the United States for the benefit of all of the people. These powers of government, held in trust by the Congress of the United States under the constitution, cannot be abdicated. The Congress of the United States cannot delegate its legislative power without destroying the very foundation of constitutional government. If it may do so, then the proposition is reduced substantially to this,—that the people, in their sovereign capacity, who have delegated the legislative power of the government of the United States to Congress and fixed and prescribed the body which should exercise that power, may be thwarted, and Congress which is the trustee of that power, may abdicate its trust, delegate its power, and defeat the will of the people themselves.

The power which has been exercised in this case necessarily involves the exercise of *legislative* power, the consideration and determination of matters of *public policy*, and is of such

a nature as may not be delegated by the Congress of the United States to the Secretary of War.

United States vs. Chandler-Dunbar Co. 229 U. S. 53;
Southern Pacific Co. vs. Olympian Co. 260 U. S. 205;
Monongahela Bridge Co. vs. United States, 216 U. S. 177;
Philadelphia Co. vs. Stimson, 223 U. S. 605;
Scranton vs. Wheeler, 179 U. S. 141;
West Chicago Street R. R. Co. vs. Chicago 201 U. S. 506.

(12) THE PERMIT OF MARCH 3, 1925, FROM THE SECRETARY OF WAR, DOES NOT JUSTIFY THE ABSTRACTION OF THESE WATERS FROM LAKE MICHIGAN BY DEFENDANTS, AS AGAINST THE STATE OF MICHIGAN.

(a) This permit is but an expression of assent.

This permit does not affirmatively appropriate the water of the Great Lakes to the Chicago drainage canal, as against the State of Michigan, complainant. It will be observed that this abstraction does not involve the taking of these waters *for the Federal Government,* nor for any of its purposes,—but by a sister state and for one of its municipal creatures. At most the permit is a mere waiver by the federal government (if any waiver could be made by the Secretary of War) of any objection on the government's part to the diversion of such an amount of water as would not constitute an obstruction to navigation.

A construction of the permit in view of section 10 of the Act of March 3, 1899, shows that it is limited to giving federal "consent". Its purpose is to express "prospectively" the *limit beyond which an abstraction of water cannot be made,* instead of authorizing an obstruction to navigation. The permit is an expression of *limitation,* rather than *a grant of power.*

The first condition of the permit provides:

> "That there shall be no unreasonable interference with navigation by the work herein authorized."

From this it is evident that the Secretary of War did not intend nor contemplate the authorization of any abstraction which would be an obstruction to the navigable capacity of the waters of the Great Lakes. The permit must be construed as authorizing the diversion of only so much of the waters as would not obstruct their navigable capacity. In short, it meant simply this,—providing you do not obstruct navigable capacity, you shall not exceed the maximum of the permit.

The permit also contains the following note:

> "NOTE:—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See Cummings v. Chicago, 188 U. S. 410.)

From the language of the note to the permit it will be observed that the administrative construction placed upon this permit by the Secretary of War, is:

> "It merely expresses the assent of the federal government so far as concerns the public rights of navigation",

beyond that it cannot and does not go. The principal decided in Cummings v. Chicago, 188 U. S. 410, and Montgomery v. Portland (190 U. S. 89) was that the authority of a state to prohibit the erection without its permission, of a structure in

a navigable river wholly within its limits, was not superseded by the provisions of the Act of Congress of March 3, 1899. In that case the court said:

> "Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act of 1899 does not manifest the position of Congress to go to that extent under the power to regulate foreign and interstate commerce, and thereby to supersede the original authority of the States."
>
> Cummings v. Chicago, 188 U. S. 410.

As a corollary to that principle, applied in the instant case, where the "structure" is one that is *not* wholly within one state, but consists in a diversion of water, which, directly affects another adjoining state, the authority of such adjoining state is a prerequisite to a *taking* of its property in its water and was not intended to be superseded by the Act of March 3, 1899. The reason supporting the rule necessitating "state assent" in the one case equally supports it in the other. Why should there be any difference in the application of this principle in a case of interstate waters, from its application in a case of intrastate waters? To say that there is a difference is to say that a state may do with impugnity as against another state the same act which would be unlawful where its own rights were involved. In short, the term "state assents" means "assent by the State directly concerned in the *effect* of the particular work."

(b) ***Being but a revocable license this permit cannot justify the invasion of property rights.***

Even assuming its validity under section 10 of the Act of March 3, 1899, this permit is a revocable license.

"After this statute was passed the Secretary of War granted various permits, which are relied on by the appellant, although in their nature they all were revocable licenses."

Sanitary District v. United States, 266 U. S. 405, 429.

"The Secretary of War could neither create nor wipe out a legal cause of action."

Corrigan Transportation Co. vs. Sanitary District, (125 Fed. 611.)

A revocable license cannot be construed as a donation of property rights. The federal government may have foreclosed itself to object, but it is no defense to an action for invasion of complainant's right, as a quasi sovereign, *parens patriae*, and proprietary owner of bed and banks of the Great Lakes, its parks and other property, to say that the State of Michigan's property rights have been taken or damaged because the federal government has waived its right to object. Such a permit gives no authority to inflict damage upon complainant, nor to do the act described in the permit in such a way as to invade the property rights of complainant.

In Baltimore and Potamac v. Baptist Church, 108 U. S. 317, 227 L. Ed. 379, it is said:

"It needs no citation of authorities in support of the proposition that the grant of powers by the legislature to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges."

In support of the same principle see:

Hubbard v. Fort, 188 Fed. 987;
Wilson v. Hudson County Water Co., 76 N. J. Eq. 543;
Cobb v. Comm. of Lincoln Park, 202 Ill. 427;

Attorney General ex rel Becker v. Bay Boom Co., 172 Wis. 363, 376;
International Bridge Co. v. New York, 254 U. S. 126, 132;
In Re Crawford County L. & D. Dist., 182 Wis. 404, 412;
Commonwealth v. Penn. Railroad Co., 72 Penn. Super. Ct. 353.

III.

THE DIVERSION AND ABSTRACTION OF WATER FROM LAKE MICHIGAN BY DEFENDANTS CONSTITUTES A TAKING OF COMPLAINANT'S PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

(Exceptions Nos. 21, 23, 24, 25, 27, 28, 29, 31, 35, 37, 38 and 39 relate to this subject.)

1. *The exercise of power by Congress over navigation is subject to the limitation of the fifth amendment.*

The power of Congress to regulate commerce among the several states and with foreign nations must be exercised by it in strict subordination to the Constitution of the United States, which is the measure of the power which Congress has had delegated to it by the people of the United States.

Gibbons v. Odgen, 9 Wheat. 196;
Cooley v. Port Wardens, 12 How. 310;
Councilman v. Hitchcock, 142 U. S. 547;
Interstate Commerce Comm. v. Brimstone, 154 U. S. 447;
United States v. Joint Traffic Association, 171 U. S. 503;
Dooley Case, 188 U. S. 321;
O'Neil v. Vermont, 144 U. S. 323;
Potapsco Guano Co. v. No. Carolina, 171 U. S. 345.

The constitutional limitation upon the exercise of the power of Congress over *navigation* requires just compensation.

> Monongahela Navigation Co. v. United States, 148 U. S. 312, 37 L. Ed. 463;
> Scranton v. Wheeler, 179 U. S. 141, 45 L. Ed. 126;
> United States v. Lynah, 188 U. S. 445, 47 L. Ed. 539;
> United States v. Cress, 243 U. S. 316, 61 L. Ed. 746.

In Monongahela Navigation Company v. United States, 148 U. S. 312, 336, 37 L. Ed. 463, 471, it is said:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th amendment, and can take only on payment of just compensation."

In Scranton v. Wheeler, 179 U. S. 141, 153, 45 L. Ed. 126, 133, it is said:

> "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th Amendment of the Constitution; and of course in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use."

In United States v. Lynah, 188 U. S. 445: 47 L. Ed. 539, it is said:

> "It is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the constitution full control over

such improvements, and that if in doing any work therefor injury results to riparian proprietors or others, it is an injury which is purely consequential, and for which the government is not liable. But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th Amendment of paying just compensation."

In United States v. Cress, 243 U. S. 316, 61 L. Ed. 746, it is said:

"As the court said, speaking by Mr. Justice Brewer, in United States v. Lynah, 188 U. S. 445, 470, 47 L. Ed. 539, 548, 23 Sup. Ct. Rep. 349: 'Where the government by the construction of a dam or other public works so flood lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the 5th Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested.'"

2. *The State of Michigan has a quasi-sovereign right over the land and water of the Great Lakes and their connecting rivers within its boundaries, and as a sovereign is the parens patriae.*

(A) *By treaty of peace Great Britain surrendered all rights to land and water within the United States.*

Upon the ratification and promulgation of the definitive treaty of peace between Great Britain and the United States in 1783, Great Britain surrendered to the United States all of her sovereign, proprietary and territorial rights in and to all of the land and water within the recognized external territorial boundaries of the United States, and all of those rights at once vested in the people of the several states in whom sovereignty resided.

Johnson v. McIntosh, 8 Wheat. 543, 584;
Manchester v. Commonwealth of Mass., 139 U. S. 266;
Martin v. Waddell, 16 Pet. 367;
Shively v. Bowlby, 152 U. S. 1;
Wheeler v. Smith, 9 How. 55, 78.

It was said by Chief Justice Marshall in Johnson v. McIntosh, 8 Wheaton 543, 584; 5 L. Ed. 681, 691:

> "By the treaty which concluded the war of the revolution, Great Britain relinquished all claim, not only to the government, but to the 'proprietary and territorial rights of the States,' whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. * * * * It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it."

In Manchester v. Commonweath of Mass. 139 U. S. 266; 35 L. Ed. 159, it is said:

> "By the definitive Treaty of Peace of September 3, 1783, between the United States and Great Britain (8 Stat. 81), His Britannic Majesty acknowledged the United States of which Massachusetts Bay was one, to be free, sovereign and independent states, and declared that he treated with them as such, and, for himself, his heirs and successors, relinquished all claims to the government, proprietary and territorial rights of the same and every part thereof. * * *"

In Martin v. Waddell, 16 Peters, 367; 10 L. Ed. 997, the Court by Chief Justice Taney said:

> "When the Revolution took place the people of each state became themselves sovereign; and in that character

hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

In Shively v. Bowlby, 152 U. S. 1; 38 L. Ed. 331, it is said:

"And upon the American Revolution all the rights of the Crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the Constitution of the United States."

In Wheeler v. Smith, 9 Howard 55, 78; 13 L. Ed. 44, 54, it is said:

"When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. And to this we must look in our judicial action, instead of the prerogatives of the crown. The State, as a sovereign, is the *parens patriae*."

(B) *Upon admission into the Union, Michigan succeeded to all of these rights.*

After the ratification and promulgation of the provisional and definitive treaties of peace by which Great Britain surrendered her proprietary, territorial and governmental rights and powers to the several states, and prior to the adoption of the constitution of the United States, the several interested states ceded to the Congress of the United States their respective rights and claimed rights to the territory now embraced within the external territorial boundaries of the State of Michigan; and the Congress of the United States, after such cession of territory to it by the several states interested therein, adopted the Ordinance of 1787 for the government of the territory northwest of the Ohio River, providing however,

that certain states might be created out of said territory, and when such states so created had sufficient population that they might be admitted into the union upon an equal footing with the original states in all respects whatever.

(1) *All States are admitted upon an equal footing.*

(a) *By Settled Principle.*

In 1 Nichols on Eminent Domain, Par. 7, it is said:

"When the people of the American colonies became independent of Great Britain, each colony became a sovereign state, and by the mere fact of sovereignty assumed absolute control over the persons and property within its jurisdiction. To each state passed all the powers of king and parliament, to be exercised as the people of the state saw fit. The states which were created later had the same powers except as they were limited by the United States Constitution. The territories derive their powers from the enabling acts of congress, and under general grants of governmental power may exercise the customary features of sovereignty such as eminent domain, but the new states on being admitted to the union came in with all the sovereign powers of the old ones.

Each one of the United States, by the mere fact of its being sovereign, has therefore complete and unqualified control over the persons and property within its jurisdiction, deducting only the powers granted to the United States and the powers it is forbidden to exercise by the constitution of the United States."

In Pollard v. Hagan, 44 U. S. 212: 11 L. Ed. 565, it is said:

"When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided

for in the deed of cession, and the legislative acts connected with it. Nothing remained to the United States, according to the terms in the agreement, but the public lands. * * * Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding. * * * Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States."

In Shively v. Bowlby, 152 U. S. 1: 38 L. Ed. 331, it is said:

"The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands below the high water mark, within their respective jurisdictions."

In Kansas v. Colorado, 206 U. S. 46, 95, the court said:

"But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states."

In Port of Seattle v. Oregon & Wash. R. R. Co. 255, U. S. 56; 65 L. Ed. 500, suit was brought to quiet title of the State of Washington in tide lands. The court said:

"The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a state, the owner of the navigable waters within its boundaries and of the land under the same. Weber v. State Harbor Comrs., 18 Wall 57, 21 L. Ed. 798. By paragraph 1 of

article 17 of its Constitution the state asserted its ownership in the bed and shore 'up to and including the line of ordinary high tide in waters where the tide ebbs and flows.' The extent of the state's ownership of the land is more accurately defined by the decisions of the highest court, as being the land below high water mark, or meander line, whichever of these lines is the lower. The character of the state's ownership in the land and in the waters is the full proprietary right."

To the same effect see:

Munn vs. Illinois, 94 U. S. 113, 124;
Hardin vs. Shedd, 190 U. S. 508, 519.

(b) *By the Ordinance of 1787,*

Article V of the Ordinance of 1787 for the government of the territory of the United States northwest of the Ohio River, provides:

"There shall be formed in the said territory not less than three, nor more than five states; * * * * * * * * * And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the congress of the United States, on an equal footing with the original states in all respects whatever; and shall be at liberty to form a permanent Constitution and state government: Provided, the Constitution and government so to be formed shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interests of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand."

Section 2 of the Act of Congress approved June 15th, 1836, entitled "An act to establish the northern boundary line of the state of Ohio, and to provide for the admission of the state

of Michigan into the Union, upon the conditions therein expressed," provides among other things:

> "And be it further enacted, That the Constitution and state government which the people of Michigan have formed for themselves be, and the same is hereby accepted, ratified and confirmed, and that the said state of Michigan shall be and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original states, in all respects whatever."

From the foregoing authorities it is clear that equality of the several states in the American Union is a fundamental principle of American Constitutional law, without which the union as it now exists could not long endure. Equality has as its basis the principle always recognized and freely declared that each of the several states, upon its admission into the union, became, was and continues to be the equal of every other state.

The State of Michigan, therefore, has all of the rights and powers of a national, independent sovereign state, over all of the land and water area within its external territorial confines.

3. *Sovereign states own all of the land and water within their boundaries as against any other state.*

Every sovereign, independent state under the settled principles of international law, to which the United States is committed, and has always avowed adherence, owns and controls, as against all other independent sovereign states, all of the real and personal property within the confines of its external territorial boundaries, even though such property is not held by public ownership, but in private ownership, and is directly controlled by private individuals as distinguished from public corporations. This is the right of eminent domain of the state.

Davis International Law, Par. 13.
15 Ruling Case Law, p. 109.
Taylor International Law, Chapt. III, p. 263.
1 Halleck International Law, Chapt. VI, Par. 13.
Hall, International Law, 5th ed., Chapt. 11, p. 100.
Glenn, International Law, Par. 34, p. 45.
Wheaton, International Law, Chapt. IV, p. 217.
1 Hyde, International Law, p. 272.
Wilson, International Law, p. 78.
1 Oppenheim International Law, 3d Ed. Par. 172.
Vattel, Law of Nations, Book II, Chap. VII.
16 Am. & Eng. Ency. of Law, 2nd Ed. 1133.
1 Cooley, Constitutional Limitations, 8th Ed. p. 4.
Church v. Hubbart, 2 Cranch 187, 234: 2 L. Ed. 249, 264.
United States v. Smiley, et al., 27 Fed. 1132; Case No. 16317.
In the Paquete Habana 175 U. S. 679; 44 L. Ed. 321.
Mayor of New York vs. Miln, 11 Pet. 102, 139; 9 L. Ed. 648.
Hudson County Water Co. vs. McCarter, 209 U. S. 349; 52 L. Ed. 828.
33 Corpus Juris 404.
Georgia v. Tenn. Copper Co. (206 U. S. 230); 51 L. Ed. 1038.
North Dakota vs. Minnesota (263 U. S. 342); 68 L. Ed. 365.

In Taylor, International Law, Chapt. III, p. 263, it is said:

"A state as a corporate person may possess property, movable and immovable, either within its own limits or beyond them. The territorial property of a state consists of all the land and water within its geographical boundaries including all rivers, lakes, bays, gulfs and straits lying wholly within them. As incidents to such territorial possessions must be added a state's jurisdiction over its marginal waters when its territory abuts upon the sea, and the right of its people to navigate such rivers as form boundaries between two or more states, or such as rising within one state traverse the territories of others on their way to the sea. The legal title to such territorial property may rest either upon (1) prescriptions, (2) conquest, (3) occupation, (4) accretion, or (5) cession."

In Hall, International Law, 5th Ed., Chapter II, p. 100, it is said:

> "The territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignty, and it comprises the whole area, whether of land or water, included within definite boundaries ascertained by occupation, prescription, or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and, when such area abuts upon the sea, together with a certain margin of water."

In Halleck's International Law, Chapter VI, Par. 13 it is said:

> "National territory consists of water as well as land. The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other State."

In Church v. Hubbart, 2 Cranch 187, 234; 2 L. Ed. 249, 264, it is said,—

> "The authority of a nation within its own territory is absolute and exclusive."

In United States v. Smiley et al., 27 Fed. Cases, p. 1132, Case No. 16317, Mr. Justice Field said,—

> "Wheaton, in his treatise on International Law, after observing that 'the maritime territory of every state extends to the ports, harbors, bays, and mouths of rivers and adjacent parts of the sea enclosed by headlands, belonging to the same state' says, 'The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will

reach from the shore, along all the coasts of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation.'"

In The Paquete Habana, 175 U. S. 679; 44 L. ed. 321, it is said,—

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot,* 159 U. S. 113, 163, 164, 214, 215, 40 L. ed. 95, 108, 125, 126, 16 Sup. Ct. Rep. 139."

In Georgia v. Tenn. Copper Co., 206 U. S. 230; 51 L. Ed. 1038, it is said:

> "The State has an interest independent of and behind the title of its citizens, in all the earth and air within its domain."

The settled principles of international law are a part of the law of the land, and the State of Michigan not only has the right, but it is its duty to invoke its binding force for the protection of its rights and the rights of its people from invasion, injury and destruction by the State of Illinois and the Sanitary District of Chicago.

Glenn's International Law, par. 34, p. 45;
Wheaton's International Law, Chap. IV, p. 217;
1 Hyde International Law, 272;
Wilson International Law, 78;
1 Oppenheim International Law, 3rd Ed. par. 172;
Vattel Law of Nations, Book 2, Chapter 7;
16 Am. and Eng. Encyc. of Law, 2nd Ed. 1133;
1 Cooley's Const. Lim. 8th Ed. p. 4;
Mayor of N. Y. vs. Miln, 11 Pet. 102;
Hudson County Water Co. vs. McCarter, 209 U. S. 349;
33 Corpus Juris, 404.

4. *The State of Michigan has proprietary rights as a riparian owner in the land and waters within its boundaries.*

Independent of the settled principles of international law, the terms of the treaty outstanding in force between the United States and Great Britain, and the doctrine of equality between the states in the American union, which lies at the foundation of our system of constitutional government, there exist certain proprietary rights on the part of the State of Michigan in the land and waters within its boundaries.

A. *The State of Michigan has the authority to determine for itself such rules of property as it shall deem expedient with respect to waters within its boundaries, both navigable and non-navigable, and the ownership of the lands forming their beds and banks.*

The question whether such ownership is in the State or in some private riparian proprietor is one of local law in each state.

Hardin v. Jordan, 140 U. S. 384;
Shively v. Bowlby, 152 U. S. 1;

Scott v. Lattig, 227 U. S. 229;
Archer v. Greenville Sand & Gravel Co. 233 U. S. 60;
Port of Seattle v. Oregon & Washington R. Co. 225 U. S. 56;
United States v. Holt State Bank, 270 U. S. 49;
Appleby v. New York, 271 U. S. 365;
Barney v. Keokuk, 94 U. S. 324;
United States v. Cress, 243 U. S. 316, 319.

In Shively v. Bowlby, 152 U. S. 1: 38 L. Ed. 331, suit was brought to quiet the title to submerged lands in the city of Astoria, Oregon. The court said,—

> "The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the Constitution and laws of the United States."

In Scott v. Lattig et al., 227 U. S. 229: 57 L. Ed. 490, suit was brought to quiet title to an island in the Snake River in Idaho. The court said,—

> "It was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty, and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations, and that each new state, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones."

In United States v. Holt State Bank, 270 U. S. 49: 70 L. Ed. 465, suit was brought to quiet title to certain real

estate and enjoin the assertion of an adverse claim. The controversy arose over whether a shallow lake constituted navigable water or was swamp land. The court said,—

"It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or affecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224, 228; Shively v. Bowlby, 152 U. S. 1, 47, 48, 57, 58, 38 L. Ed. 331, 348, 349, 352, 14 Sup. Ct. Rep. 548; Scott v. Lattig, 227 U. S. 229, 242, 57 L. Ed. 490, 496, 44 L. R. A. (N. S.) 107, 33 Sup. Ct. Rep. 242; Seattle v. Oregon & W. R. Co., 255 U. S. 56, 63, 65 L. Ed. 500, 506, 41 Sup. Ct. Rep. 237; Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 83-85, 67 L. Ed. 140, 144, 145, 43 Sup. Ct. Rep. 60. But, as was pointed out in Shively v. Bowlby, 152 U. S. 49, 57, 58, 38 L. Ed. 349, 352, 14 Sup. Ct. Rep. 548, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exi-

gency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

B. *The State of Michigan has established the rule that the state is the proprietary owner of the waters of the Great Lakes within its boundaries and of the lands forming their beds and banks.*

The State of Michigan, in the exercise of its sovereign power to determine the ownership of the waters of the Great Lakes, their beds and banks, has established the rule that the title belongs to the State of Michigan outside the meander lines, and that the lands laid bare by a recession of the waters of the Great Lakes do not belong to the riparian proprietors upon such lakes, but belong to the State of Michigan.

Accordingly the State of Michigan has been determined the owner in its sovereign capacity, of all submerged lands beneath the waters of the Great Lakes (not ceded to private ownership) in trust for the public; also the banks of the Great Lakes outside of the meander lines which mark their low water mark; also twenty-six public parks bordering upon the waters of the Great Lakes in addition to Mackinac Park; (a public park ceded to the State of Michigan by the United States government); also the wharves, piers, docks and landing places at St. Ignace and Mackinaw City used in connection with its state owned and operated ferries which ply across the straits of Mackinaw between St. Ignace and Mackinaw City, as a part of its highway system and transportation; also the land laid bare by the recession of the rivers connecting the Great Lakes belonging to the riparian owners; also the right, usufructuary in character,

but firmly established and universally recognized by law, —to have the waters of the Great Lakes, and of the connecting water-ways between the same, maintained in the natural and normal level, subject only to the reasonable use thereof by other proprietors.

1. *In Michigan the title to riparian property outside the meander line on the Great Lakes is held in trust by the State for the use of its citizens.*

Ainsworth v. Munoskong Hunting & Fishing Club, 159 Mich. 61.
State v. Venice of America Land Co., 160 Mich. 680.
Kavanaugh v. Rabior, 222 Mich. 68.
Kavanaugh v. Baird, 241 Mich. 240 (decided Jan. 3, 1928).

In Ainsworth v. Munoskong Hunting & Fishing Club, 159 Mich. 61, plaintiffs filed a bill to restrain defendant from interfering with their right to hunt on Munoskong Bay. The court held that this bay was a part of Lake Huron rather than of the Sault Ste. Marie river. The court said,—

"It is the established law of this State that riparian owners along the *Great Lakes own only to the meander line,* and that title outside this meander line, subject to the rights of navigation, is held in trust by the State for the use of its citizens. Among these is the common right to fish and [redacted]. *La Plaisance Bay Harbor Co. v. City of Monroe,* Walk. Ch. (Mich.) 155; *People v. Silberwood,* 110 Mich. 106 (67 N. W. 1087, 32 L. R. A. 694); *People v. Warner,* 116 Mich. 228 (74 N. W. 705); *State v. Shooting Club,* 127 Mich. 580 (87 N. W. 117); *Lincoln v. Davis,* 53 Mich. 375 (19 N. W. 103, 51 Am. Rep. 116). In these cases, and others cited therein, the subject has been fully discussed, and further discussion here would be unprofitable."

In State v. Venice of America Land Co., 160 Mich. 680, the state successfully maintained a bill to enjoin defendants from taking possession of, platting and selling certain lands. It is said, —

> "The condition of this territory when the State was admitted into the Union is the condition which must control. That the State of Michigan holds these lands in trust for the use and benefit of its people—if we are correct in our conclusion—cannot be doubted. The State holds the title in trust for the people for the purposes of navigation, fishing, etc. It holds the title *in its sovereign capacity*. *People v. Silberwood*, 110 Mich. 103 (67 N. W. 1087, 32 L. R. A. 694; *State v. Fishing & Shooting Club*, 127 Mich. 580 (87 N. W. 117).
>
> "An exhaustive discussion of the nature of the State's title to the land beneath the waters of the Great Lakes, and of the question whether any part of such territory can be acquired, as against the State, by adverse possession, will be found in the minority opinion of Justice Hooker in the last above case. It there clearly appears from an abundance of authority that title to submerged lands in the Great Lakes held by the State cannot be divested by adverse possession; it being held in trust for the public, according to the original cession from Virginia and the ordinance of 1787. The late case of *Illinois Steel Co. v. Bilot*, 109 Wis. 418 (84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905), supports this view. *Olds v. Commissioner of State Land Office*, 150 Mich. 134 (112 N. W. 952); *Ainsworth v. Hunting & Fishing Club*, 159 Mich. 61 (123 N. W. 802)."

In Kavanaugh v. Rabior, 222 Mich. 68, 71, it is said,—

> "While it is generally held that the title to lands under rivers and inland lakes belongs to the riparian proprietors, a different rule has been made with reference to the Great Lakes. The Great Lakes have been classed with tide waters, and the same rules applied. *People v. Silberwood*, 110 Mich. 103 (32 L.

R. A. 694); *Ainsworth v. Hunting & Fishing Club*, 159 Mich. 61.

"In the last case cited it was said:

" 'It is the established law of this State that riparian owners along the Great Lakes own only to the meander line, and that title, outside this meander line, subject to the rights of navigation, is held in trust by the State for the use of its citizens.' (citing authorities.)

"The Wisconsin court has reached the same conclusion. Diedrich v. Railway Co., 42 Wis. 248 (24 Am. Rep. 399).

"In *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387 (13 Sup. Ct. 110), will be found a very learned and exhaustive opinion on this question by Mr. Justice Field, and he therein reaches the conclusion that the states bordering on the Great Lakes own the title of the land in trust which is covered by their waters."

In Kavanaugh vs. Baird, 241 Mich. 240, 245, (decided Jan. 3, 1928), it was said:

"This court, irrespective of what other courts have held, and irrespective of what text writers have said, is committed to the trust doctrine as applied to lake bottom lands in the Great Lakes."

2. *The State of Michigan has a right of dockage upon the Great Lakes and connecting waters as riparian owner and also as representative of its people.*

The State, in its proprietary capacity, is the owner of the parks bordering upon the Great Lakes, without reservation, and also the owner of the docks erected to aid the operation of its ferries running between Mackinaw City and St. Ignace. In its governmental capacity the State is a representative of all riparian proprietors bordering upon the Great Lakes, and the connecting waterways between the same. The State has a right of dockage upon the navigable waters of the Great Lakes, inci-

dent to its riparian ownership, and in its governmental capacity is representative of all riparian owners having such right of dockage.

Transport Co. v. Parkersburg, 107 U. S. 707;
Dutton v. Strong, 66 U. S. 23;
Yates v. Milwaukee, 10 Wall. 497;
Kavanaugh v. Baird, 241 Mich. 240;
Rice v. Ruddiman, 10 Mich. 125;
Richardson v. Prentiss, 48 Mich. 88;
Lincoln v. Davis, 53 Mich. 375;
Blodgett & Davis Lumber Co. v. Peters & Morrison, 87 Mich. 498;
People v. Silberwood, 110 Mich. 103;
Commissioner of Highways v. Ludwick, 151 Mich. 498;
Stuart v. Greanyea, 154 Mich. 132;
Walker v. Shepardson, 4 Wis. 486;
Delaplaine v. Chicago and Northwestern Railway Company, 42 Wis. 214; 24 A. R. 386;
Madison v. Mayers, 97 Wis, 399; 73 N. W. 43, 40 L. R. A. 637;
Miller v. Mendenhall, 43 Minn. 95; 44 N. W. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219;
Mobile Dry Dock Co. v. Mobile, 146 Ala. 198;
Ladies' Seaman's Friends Society v. Halstead, 58 Conn. 144;
Norfolk City v. Cooke, 27 Gratt. 430;
Alexandria & F. R. Co. v. Faunce, 31 Gratt. 761;
Buffalo v. Delaware, L. & W. R. Co., 39 N. Y. Supp. 4;
Saunders v. N. Y. C. & H. R. R. Co., 54 N. Y. Supp. 364;
Deering v. Proprietors of Long Wharf, 25 Me. 51;
Mather v. Chapman, 40 Conn. 382;
Com. v. Pierce, 2 Dane, Abr. 696;
Clement v. Burns, 43 N. H. 618;
Bell v. Gough, 23 N. J. 624;
N. J. Zinc & I. Co. v. Morris Canal & Bkg. Co., 44 N. J. Eq. 398.

In Transport Co. v. Parkersburg, 107 U. S. 707, it is said:

> "Wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river."

In Dutton v. Strong, 66 U. S. 35, it is said:

> "Piers or landing places, and even wharves, may be private or they may be, in their nature, public; although the property may be in an individual owner; the owner may have the right to the exclusive enjoyment of the structure and to exclude all other persons from its use. * * * "

In Yates v. Milwaukee, 10 Wall. 497, it is said:

> "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are accesses to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier, for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be."

In Kavanaugh vs. Baird, 241 Mich. 240, 253, it was said:

> "Upon the Great Lakes the right of the riparian owner to erect docks, to wharf out to navigability, is not only valuable to the riparian owner but an absolutely necessary aid to navigation. Without wharves and docks built by riparian owners commerce on the Great Lakes would come to an end."

3. *A different rule prevails in the state of Michigan as to the rights of riparian proprietors upon the navigable rivers.*

Every riparian proprietor upon a navigable river in the state of Michigan, as an incident to his riparian ownership, owns to the middle line or thread of the stream, in the absence of express reservation. This rule applies to the St. Mary's River, the St. Clair River, the Detroit River and the River Rouge.

Lorman v. Benson, 8 Mich. 18;
Rice v. Ruddiman, 10 Mich. 128;
Ryan v. Brown, 18 Mich. 196;
Watson v. Peters, 26 Mich. 508;
Richardson v. Prentiss, 48 Mich. 88;
Bay City Gas Light Co. v. Industrial Works, 28 Mich. 182;
Maxwell v. Bay City Bridge Co., 41 Mich. 466;
Pere Marquette Boom Co. v. Adams, 44 Mich. 403;
Backus v. Detroit, 49 Mich. 110;
Fletcher v. Thunder Bay River Boom Co., 51 Mich. 277;
Webber v. Pere Marquette Boom Co., 62 Mich. 636;
Butler v. Railroad Co., 85 Mich. 255;
Grand Rapids Ice and Coal Co. v. South Grand Rapids Ice & Coal Co., 102 Mich. 227;
People v. Silberwood, 110 Mich. 106;
Scranton v. Wheeler, 113 Mich. 565;
Goff v. Gougle, 118 Mich. 307;
Brown v. Parker, 127 Mich. 392;
Kemp v. Stradley, 134 Mich. 676;
Fuller v. Bilz, 161 Mich. 589;
People v. Grand Rapids Power Co., 164 Mich. 121;
Nedtweg v. Wallace, 237 Mich. 14;
Collins v. Gearhart, 237 Mich. 38;
U. S. v. Chandler-Dunbar Water Power Co., 209 U. S. 444: 52 L. Ed. 880;
G. R. & I. R. R. Co. v. Butler, 159 U. S. 87: 40 L. Ed. 85;
Scranton v. Wheeler, 179 U. S. 133: 45 L. Ed. 133.

5. *These rights as quasi sovereign and as a proprietary owner are property rights of the State of Michigan in the land and waters within its boundaries upon the Great Lakes and their connecting waters.*

a. *Property in its legal conception.*

The idea of property is difficult to define. It was imbedded in the jurisprudence of imperial Rome. Grotius and Puffendorf, writing in the days of colonial expansion and international disputes over distant lands, sought to base the idea on agreement or compact. Blackstone criticises the views of Grotius, Puffendorf, Barbeyrac, Titius and Locke, and insists that the basis of property is occupancy. Blackstone's views have been criticised by Sir Henry Maine, Chief Baron Pollock and others. Herbert Spencer and Lorimer thought property was naturally created by the economic necessity of individual existence. Hegel conceived that it resulted from projecting the individual will over external objects. Von Ihring says, "Property is but the periphery of my person extended to things," and Kohler says, "the totality of a person's proprietary powers constitutes his property."

At the time of the separation of the American colonies from Great Britain the case of *Entick v. Carrington,* 19 Howell's State Trials, 1030, 1066, had been decided. In that case, Lord Chief Justice Camden, speaking for the court, said,—

> "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions,

> forfeitures, taxes, etc., are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass."

This may be regarded as an accurate statement of the common law when the colonies severed themselves from the mother country.

Madison, in the tenth Federalist, spoke of "The diversity in the faculties of men, from which the rights of property originate," and he added, "From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results."

Individual domination over land was not regarded as important, say Pollock and Maitland, in the early history of English law. Possession, not ownership, was the leading conception.

Gouverneur Morris, in the constitutional convention, said that life and liberty were said to be of more value than property. "An accurate view of the matter would nevertheless prove that property was the main object of society."

John Rutledge expressed the view that property was the principal object of society. Rufus King supported the same doctrine. Charles C. Pinckney spoke of this as "a government instituted for the protection of property." Pierce Butler called it, "A government instituted principally for the protection of property"; and, he "contended vigorously that property was the only just measure of representation." James Wilson did not agree "that property was the sole and primary object of government and society." So important was property regarded, at the time, that the fifth amendment to the federal constitution provides that no one shall be deprived

of property without due process of law and just compensation.

The legal conception of property has been considered and defined in many cases.

Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308;
1 Lewis Eminent Domain, 3rd Ed. Par. 63;
City of St. Louis v. Hill, 116 Missouri, 527;
Bailey v. People, 190 Ill. 28;
Chicago and Western Indiana R. R. Co. v. Englewood Connecting Railroad Co., 115 Ill. 375;
City of Denver v. Bayer, 7 Colo. 113;
12 Corpus Juris, 945;
Buchanan v. Warley, 245 U. S. 71: 62 L. Ed. 149;
Eaton v. Boston, Concord & Montreal Railroad Company, 51 N. H. 504: 12 Am. Rep. 147;
Fisher v. Bountiful City, 21 Utah 29;
Old Colony & Fall River Railway Co. v. County of Plymouth, 14 Gray 155, 161;
Rice v. Ruddiman, 10 Mich. 145.

In Buchanan v. Warley, 245 U. S. 71: 62 L. Ed. 149, it is said,—

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391; 42 L. Ed. 780, 790. * * * Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land."

In Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, 319, 320, the court said,—

> "Of what does property practically consist, but of the incidents which the law has recognized as attached to the title, or right of property? Is not

the idea of property in, or title to lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of?' Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practicably valuable to him? And among the incidents of property in land, or anything else, is not the right to enjoy its beneficial use, and so far to control it as to exclude others from that use, the most beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than of the mere abstract idea of property without incidents? This use, or the right to control it with reference to its use, constitutes, in fact, all that is beneficial in ownership, except the right to dispose of it; and this latter right or incident would be rendered barren and worthless, stripped of the right to the use. Property does not consist merely of the right to the ultimate particles of matter of which it may be composed,—of which we know nothing,—but of those properties of matter which can be rendered manifest to our senses, and made to contribute to our wants or our enjoyments."

In Hall v. Ionia, 38 Mich. 493, it is said:

"The ownership of it (use of water) cannot be confined to a right in the nature o a license, and it is as well recognized a title or in rest of a real nature as land itself."

In 1 Lewis Eminent Domain, 3rd Ed. Par. 63, it is said,—

"Property may be defined as certain rights in things which pertain to persons, and which are granted and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition."

In City of St. Louis v. Hill, 116 Missouri 527, it is said,—

> "Property then, in a determinate object, is composed of certain constituent elements, to-wit, the unrestricted right of use, enjoyment and disposal of that object."

In Bailey v. People, 190 Ill. 28, it is said,—

> "The term 'property' includes every interest which one may have in anything and everything that is the object of ownership by man, together with the right to freely possess, use, enjoy and dispose of the same."

In Chicago and Western Indiana Railroad Company v. Englewood Connecting Railroad Co., 115 Ill. 375, it is said,—

> "Property itself in a legal sense is nothing more than the exclusive right of possessing, enjoying and disposing of a thing which of course includes the use of a thing."

In City of Denver v. Bayer, 7 Colorado, 113, it is said,—

> "Property * * * is not alone the chattel or the land itself, but the right to freely possess, *use* and alienate the same."

In 12 Corpus Juris, p. 945, it is said,—

> "The right of private property secured by guaranties in the federal and state constitutions, includes the right to acquire, possess, protect, enjoy, and dispose of such property."

In Eaton v. Boston, Concord & Montreal Railroad Company, 51 N. H. 504: it is said,—

"The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * ** * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' Seldon J., in *Wynehamer* v. *The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence, 3d ed., 817, 819. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d ed., 836; Wells, J., in Walker v. O. C. W. R. R., 103 Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property,'—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership.

"If, on the other hand, the land itself be regarded as 'property,' the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, 'in its corporeal substance and entity,' is 'property,' still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of owner-

ship which make 'property' valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See Comstock, J., in *Wynehamer* v. *The People*, 13 N. Y. 378, p. 396.

In Fisher v. Bountiful City, 21 Utah 29, it is said,—

> "The right to own property carries with it the right to exercise dominion and control over it. When the dominion, control, and management of one's property is taken away from him, the right to private property is violated. To take away the dominion and control over property is to take the property itself, for the absolute right to property includes the right of dominion, control, and the management thereof."

In Old Colony & Fall River Railway Co. v. County of Plymouth, 14 Gray 155 to 161, Justice Shaw said,—

> "The word 'property' in the tenth article of the bill of rights, which provides that whenever the public exigencies require that the property of an individual should be appropriated to public uses, he shall receive compensation therefor, should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such."

B. *The State of Michigan as a sovereign, as parens patriae and in its proprietary capacity, has definite property rights in the waters of Lake Michigan, its bed and banks.*

The State of Michigan in its proprietary capacity as the owner of all of the land outside of the meander lines along the Great Lakes and between such meander lines and its external territorial boundaries, whether submerged or not; as the owner of the land laid bare by a recession of the waters of the Great Lakes outside the meander lines and within its territorial boundaries; as the owner of its various public parks bordering upon the Great Lakes and the connecting

waterways between the same; as the owner and proprietor of the wharves, docks, piers and landing places used by it in connection with its operation of the ferries across the Straits of Mackinac between the cities of St. Ignace and Mackinaw City; as the owner of the proprietary right to all of the water within its domain, and in its governmental capacity as the sovereign proprietor of all of the public domain within the territorial boundaries of the state; as the representative of all of the various persons who own property bordering upon the Great Lakes and the connecting waterways between the same within the State of Michigan and subject to its jurisdiction and entitled to its protection, *has a right to have the water of the Great Lakes and the connecting waterways between the same maintained at its natural and normal level. This is a right inseparably annexed to the soil and which passes with it as a part and parcel of the land, subject only to the paramount right of congress to utilize and improve such waters for the purposes of navigation.* This right is a right of property as sacred as the right to the soil over which the water flows,—a right of which no one may be disseized but by lawful judgment of his peers or by due process of law, *and upon just compensation.*

(1) The State of Michigan is entitled to have all the water coming naturally to it, yielding only if at all to the demand of public commercial necessity as asserted by appropriate Congressional action.

Gardner v. Newburgh, 2 Johnson's Chancery, 165;
Kansas v. Colorado, 206 U. S. 46;
Hudson County Water Co. v. McCarter, 209 U. S. 349;
United States v. Rio Grande, 174 U. S. 690;
Missouri v. Illinois, 180 U. S. 208;
United States vs. Chandler-Dunbar Water Co., 229 U. S. 54;
Hoge v. Eaton, 135 Fed. 411, 414;
Holyoke Water Power Co. v. Connecticut River Company, 20 Fed. 71;
Pine v. New York, 112 Fed. 98;

United States v. River Rouge Improvement Co. 269 U. S. 411;
Gould on Waters, 2d ed., 396;
Rigney v. Tacoma Electric Light & Water Co. 9 Wash. 576;
Crawford County v. Hathaway, 67 Neb. 325, 340; 93 N. W. 788;
Ohio & Mississippi Ry. Co. v. Thillman, 143 Ill. 127;
Wyoming v. Colorado, 259 U. S. 419, 466;
Kansas v. Colorado, (206 U. S. 46, 51, 94); (51 L. Ed. 956, 973);
Farnham on Waters (1904), Vol. I, Page 29, 59;
Tetherington v. Donk Bros., 232 Ill. 522;
Thomas v. Coal Co. (199 Ill. App. 50, 58);
Hyatt v. Albro, 121 Mich. 638;
Embrey v. Owen, 6 Exch. 353;
3 Kent Comm. 439;
I. Wiel Water Rights, 1911, 3rd Ed. sec. 283, 285, 711.

In Gardner v. Newburgh, 2 Johnson's Chancery, 165, Chancellor Kent said:

> "A right to a stream of water is as sacred as a right to the soil under which it flows. It is a part of the freehold, of which no man can be disseized, but by lawful judgment of his peers, or by due process of law."

In United States v. Rio Grande Dam and Irrig. Co., 174 U. S. 690, 702, this court said:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations to quote the language of Chancellor Kent, 3 Kent Comm. Sec. 439—'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the waters which flow in the stream adjacent to his lands as it was wont to run (*currere solebat*) without dimunition or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua*

currit et debet currere solebat, is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate.'"

In Hudson County Water Company v. McCarter, 209 U. S. 349, it was said:

"We are of the opinion further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent on any nice estimate of the extent of present use or speculation as to future needs. * * * It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

In Gould on Waters 2d ed. 396, it is said:

"The right to the use of waters in its natural flow is not a mere easement and appurtenance but is inseparably annexed to the soil itself."

In Rigney v. Tacoma Electric Light and Water Company, 9 Wash. 576, the court said:

"The right to the use of waters flowing over land is identified with the realty. It is a real and corporeal hereditament, and this right is a substantial one and may be the subject of sale or lease like the land itself."

In Crawford County v. Hathaway, 67 Neb. 325, 340, 93 N. W. 788, it is said:

"The riparian proprietor, say all the books and the authorities, has a right to the flow of the water of the natural stream passing through or by his land; such right being inseparably annexed to the soil, and passing with it, not as an easement or appurtenance, but as a part of the land. This property right can be regarded only as a

corporeal hereditament belonging to and incident to the soil, the same as though it were stones thereon, or grass or trees springing from the earth. Gould, Waters, section 204 and authorities there cited. The riparian right to the use of the water flowing in a natural watercourse is a property right, which should be regarded as such, and to protect which the owner may resort to any or all instrumentalities which may be employed for the protection of private property rights generally. *Gould v. Boston Duck Co.* 13 Gray (Mass.), 422; *Ashley v. Pease,* 18 Pick, (Mass.) 268; *Blanchard v. Baker* 8 Me. 253, 23 Am. Dec. 504; *Keeney & Wood Mfg. Co.,* 39 Conn. 576, 582; *Beissel v. Sholl,* 4 Dall. (U. S.), 211, 1 L. ed., 804."

"The property in water belonging to a riparian proprietor and his right to the reasonable use thereof, as we have seen, is a part and parcel of the land, inseparably annexed to the soil, and is property within the meaning of that word, of which the owner cannot be divested save and except by some lawful method, which would apply alike to all species of real property and appurtenances belonging thereto."

In Ohio & Mississippi Ry. Co. v. Thillman, 143 Ill. 127, the railway company placed an embankment across the water course. As a result of the embankment the natural flow of water was impeded and set back, flooding the lands of the riparian proprietor. The court said:

"It is stated by all the authorities that it is the right of each proprietor of land upon a natural water course to insist that the water shall continue to run as it has been accustomed to do, and to insist that no one shall obstruct or change its course injuriously to him, without being liable in damages."

In Wyoming v. Colorado, 259 U. S. 419, 466, this court said:

"The contention of Colorado that she as a state may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be main-

tained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right. It has support in other cases, of which *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. Ed. 1032; *Bean v. Morris*, 221 U. S. 485, 31 Sup. Ct. 703, 55 L. Ed. 821; *Missouri v. Illinois*, 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497; and 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572, and *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488, are examples."

From the foregoing authorities the rule is well settled that the right to the flow of water is a part of the land and as such is a proprietary right. If the lower riparian owner may claim as against the upper riparian owner the right to a continued uninterrupted flow of the stream passing his lands, why may not the lower state enforce as against the upper the same right as one of its citizens could enforce against a citizen of another state? A riparian owner could claim only the right to use the water, whereas the State has a right to the full proprietary ownership of these waters. This Court has definitely settled the proposition that an upper riparian state upon an interstate stream or water course may not divert, appropriate, or use the water from that stream within its border to the injury of a lower riparian state, and that has been held without regard to any prejudice which may be worked to the right of the lower state and its citizens.

6. THIS DIVERSION OF WATER BY THE STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, AMOUNTS TO A TAKING OF THE PROPERTY OF THE STATE OF MICHIGAN.

(A) Taking in its legal conception.

The general rule is that any injury to rights or property which, if caused by a private person without authority of statute would give the plaintiff a cause of action against such person, constitutes a taking of property, entitling one to compensation, notwithstanding the statute which legalizes the damaging work.

Delapiaine v. Chicago & N. W. R. R. Co., 42 Wis. 214.
1 Mills on Eminent Domain, Par. 183.
Trinity Sabine R. Co. v. Meadows, 73 Texas 32, 3 L. R. A. 565.
Gould on Waters, (2d Ed.), p. 497.
Peel v. The City of Atlanta, 85 Ga. 138, 8 L. R. A. 787.
1 Lewis Eminent Domain, 3rd Ed. Par. 65.
1 Nichols on Eminent Domain, Par. 28.
Avery v. Fox, 2 Fed. Cases, Case No. 674.
Central Trust Co. of New York v. Hennen, 90 Fed. Rep. 593.
James v. Campbell, 104 U. S. 358; 26 L. ed. 786.
Johnson v. United States, 4 Court of Claims, 250.
Eaton v. Boston, Concord & Montreal Railroad Co., 51 N. H. 504; 12 Am. Rep. 147.
Cooley's Constitutional Limitations 8th Ed. 1158.
Foster v. The Stafford National Bank, 57 Vt. 128.
City of Mansfield v. Balliett, 65 Ohio St. 451; 58 L. R. A. 628.
Broadwell v. The City of Kansas, 75 Missouri 213.
People ex rel. The Manhattan Savings Institution of the City of New York v. Norton P. Otis, et al., 90 N. Y. 48.
McCord v. High, 24 Iowa 336.
Memphis & Charleston Railroad Co. v. Birmingham, Sheffield & Tennessee River R. Co., 96 Ala. 571: 18 L. R. A. 166
City of Schenectady v. Furman, 145 N. Y. 482.
Gaylord v. The Sanitary District of Chicago, 204 Ill. 576: 63 L. R. A. 582: 98 Am. St. Rep. 235.
City of Clinton v. Franklin, 119 Ky. 143: 83 S. W. 142.
Oregon Short Line Railroad Company v. Jones, et al., 29 Utah 147.
Leffmann v. Long Island Ry. Co. 93 New York Supp. 647.

Knowles v. New Sweden Irrigation District, 16 Idaho, 217.
School Town of Andrews v. Heirey, 178 Ind. 1.

In the case of Delaplaine v. C. & N. R. R. Co., 42 Wis. 214, the court, commenting on the case of Duke of Buccleuch v. Metropolitan Board of Public Works, L. R. 5 H. L. 418, which arose under the English Land Clauses Consolidation Act, which gave damages for lands "injuriously affected," said:

> "The test applied to determine the proper meaning of the words, 'injuriously affected' as giving a right to compensation was whether the act done in carrying out the works in question was an act which would have given a right of action if the works had not been authorized by act of Parliament, * * In other words, if the act affecting the land had been done by an individual, he would be liable for the damages."

In Mills on Eminent Domain, paragraph 183, it is said:

> "If land is injured and in consequence of an act which would have been the subject of an action at common law but for the statute, compensation may be required and awarded."

In Trinity Sabine R. Co. v. Meadows, 73 Texas 32, 3 L. R. A. 565, it is said that:

> "If a railway company * * in constructing its road did an act injurious to an adjacent neighboring proprietor for which if done by the original owner he would have been responsible at common law, the company should be liable to compensate the proprietor so injured."

So in Gould on Waters, (2d Ed.) page 497, it is said:

> "A land owner who should sustain injuries from the construction of works authorized by statute is not entitled to compensation, unless the injury is such as to give a right of action had the works not been authorized."

And in Peel v. The City of Atlanta, 85 Ga. 138, 8 L. R. A. 787, the court in passing upon a constitutional provision similar to ours said:

> "The test is, would the injury, if caused by a private person without authority of statute, give the plaintiff a cause of actior against such person? If so, then he is entitled to compensation notwithstanding the statute which legalizes the damaging work."

In 1 Lewis Eminent Domain, 3rd Ed. Par. 65, it is said:

> "If, for damage caused to my land by certain acts of my neighbor done upon his own land for his own use, I may have compensation, and if, for the same damage caused by the same acts done upon the same land by the public or its agents for public use I can have no compensation, it is plain that the right upon which the former action was founded has been taken from me, that so much has been subtracted from my property in the land. Every such taking we hold to be within the constitutional prohibition requiring compensation to be made. In any given case, therefore, where the land of an individual has been damaged or diminished in value by the construction or operation of works for public use, whether he is entitled to compensation or not will depend upon whether the damage or deterioration is due to an interference with any right appurtenant to the land or parcel of his property in it. If this question can be answered in the affirmative, there is a right to compensation; otherwise, not."

In 1 Nichols on Eminent Domain, Par. 28, it is said:

> "There is one limitation upon the power of eminent domain which depends upon no express constitutional provision. The powers of a sovereign state, however vast in their character and searching in their extent, are inherently limited to subjects within the jurisdiction of the state, and any attempt to exercise governmental powers in another state is necessarily void. A state therefore cannot take or authorize the taking of property or rights in property situated in another state, and, conversely, each

state holds all the property within its limits free from the eminent domain of any other state and cannot be compelled to surrender such property to another state in any way."

In Eaton v. Boston, Concord & Montreal Railroad Company 51 N. H. 504; 12 Am. Rep. 147, 151, it is said:

"To constitute a 'taking of property,' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking of the property altogether.' These views seem to us to be founded on a misconception of the meaning of the term 'property,' as used in the various State constitutions.

* * * * * * * * * *

"From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto,* taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property'—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a 'taking of property.' Why not the former? * * * * * * * Among these elements is fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See Comstock, J., in *Wynehamer* v. *The People,* 13 N. Y. 378, 396. A physical interference with the land, which substantially abridges this right, takes the owner's 'property' to just so great an extent as he is thereby deprived of his right. 'To deprive one of the use of his land is depriving him of his land';

for, as Lord Coke said, 'What is the land but the profits thereof?' Sutherland, J., in *People* v. *Kerr*, 37 Barb. 257, 399; Co. Litt. 4 b. The private injury is thereby as completely effected as if the land itself were 'physically taken away.'"

In Cooley's Constitutional Limitations 8th Edition 1158, it is said:

"Any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation. * * * So a partial destruction or diminution of value of property by an act of the government which directly and not merely incidentally affects it, is to that extent an appropriation. And any regulation which deprives any person of the profitable use of his property constitutes a taking, and entitles him to compensation, unless the invasion of rights is so slight as to permit the regulation to be justified under the police power."

In Avery v. Fox, 2 Fed. Cases, Case No. 674, (1868) a bill was filed for an injunction against the defendants to restrain them from constructing a new channel from White Lake into Lake Michigan. In disposing of the case the court said:

"This right of private persons to the use of water as it flows by or through their lands, in any manner not inconsistent with the public easement, is as sacred as is the right of a person to his land, his house, or his personal property. The public, however, have the right to use such streams as are navigable as highways, and the owner of a bed of a stream has no rights in the water thereof which will permit him to use it to the injury of the public. He cannot so far divert the water to his private use as to render navigation impossible or difficult, nor can he place obstructions in the stream in a manner to produce such results. His right and the right of the public to the use of the water of such streams are to remain unimpaired as far as possible, but the right of the public for purposes of navigation is paramount, and there can be no use of the water by a riparian proprietor inconsistent with the public easement. * * *"

In Central Trust Co. of New York v. Hennen, 90 Fed. Rep. 593 (1898) decided by the Circuit Court of Appeals, Sixth Circuit (Justices Taft, Lurton and Clark sitting) involved the question of the taking of a private right of way or easement taken without compensation by a railway company. Compensation was afterward referred to the state court and the claim for such compensation presented as a preferential claim against the assets arising from the sale of the railway company on mortgage foreclosure. In disposing of the case the court, through Mr. Justice Clark said:

> "Assuming that this right of way or easement was vested in the petitioner as claimed, we concur with the learned circuit judge in the opinion that a direct, permanent injury to, or the destruction of, such right of ingress and egress, would, to the extent of the damage actually sustained, be the taking of private property for public use. Pumpelly v. Green Bay Co. 13 Wall. 166. And the damages sustained by reason of such a taking would constitute a preferential claim on the proceeds arising from the sale of property, entitled to priority of satisfaction as against the bonds secured by the mortgage. Such a claim in this respect could not be, and in the adjudications has not been, distinguished from the ordinary claim to compensation for property taken or condemned for a right of way, or for the purchase price of a right of way conveyed directly to a railroad company, or any part of such purchase price. Whether land for a right of way is acquired by a railroad company by contract, condemnation, or unlawful taking, the owner is equally entitled to just compensation, and the manner of taking or acquisition does not change the nature or priority of the compensation justly due."

(B) *It is not necessary that the property be absolutely and physically taken from the possession of the complaining party, and the complaining party ejected from possession and use.*

(1) *If water is dammed up or set back upon or over land so as to destroy its essential use, it constitutes a taking of property.*

In order that the acts of defendants constitute a taking of property within the meaning of the use of the word "taking" in the fifth and fourteenth amendments to the constitution of the United States, it is not necessary that the property be absolutely and physically taken from the possession of the complaining party and the complaining party ejected from possession and use. If water is dammed up or set back upon and over land of the complaining party so as to destroy its essential use, that constitutes a taking of property, because it takes from the complaining party the usual and ordinary use of the property, and the usual and ordinary use of property is its principal valuable attribute.

When the land of any one is so interfered with, injured, destroyed or damaged by its overflow by water that the owner thereof is deprived of the usual and ordinary use of the same; when the land area is converted into a water area; such overflow, injury or damage, constitutes a taking of property within the meaning of the fifth and fourteenth amendments of the constitution of the United States. To put water upon land so as to destroy its usual and ordinary use constitutes a taking of property.

Pumpelly v. Green Bay and Mississippi Canal Co., 13 Wall. 166: 20 L. Ed. 557;
United States v. Lynah, 188 U. S. 445, 47 L. Ed. 539;
United States v. Cress, 243 U. S. 316: 61 L. Ed. 746;
King v. United States, 59 Fed. Rep. 9;
Williams et al. v. United States, 104 Fed. Rep. 50;
Morris v. The United States, 30 Ct. of Claims, 162;
Jackson et al. v. The United States, 31 Ct. of Claims, 318;
Stevens v. The Proprietors of the Middlesex Canal, 12 Mass. 466;
Evansville and Crawfordsville Railroad Company v. Dick, 9 Ind. 433;
Kemper and wife v. City of Louisville, 77 Ky. 87;
Conniff v. The City and County of San Francisco, 67 Calif. 49;
Nevins v. City of Peoria, 41 Ill. 502;

Beidler, et al. v. The Sanitary District of Chicago, 211 Ill. 628;
Doty v. Village of Johnson, 84 Vermont 15;
Ft. Worth Improvement District No. 1 v. City of Ft. Worth, 106 Tex. 148; 158 S. W. 164: 48 L. R. A. (N. S.) 994.

In Pumpelly v. Green Bay and Mississippi Canal Company, 13 Wall. 166: 20 L. Ed. 557 (1872) an action of trespass on the case was brought by plaintiff in error charging the defendant with overflowing 640 acres of plaintiff's land by means of a dam erected across the Fox River, an outlet of Lake Winnebago, Wisconsin, by which the waters of the lake were raised so high as to overflow the plaintiff's land. The case reached the Supreme Court of the United States, and in disposing of it, it is said,—

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it should be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.
>
> "In the case of *Sinnickson* v. *Johnson*, 2 Harr. (N. J.) 129, the defendant had been authorized by an Act of the

Legislature to shorten the navigation of Salem Creek by cutting a canal, and by building a dam across the stream. The canal was well built, but the dam caused the water to overflow the plaintiff's land, for which he brought suit. Although the State of New Jersey then had no such provision in her constitution as the one cited from Wisconsin, the Supreme Court held the statute to be no protection to the action for damages. Dayton, J., said 'that this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; and they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle.' For this proposition he cites numerous authorities, but the case is mainly valuable here as showing that overflowing land by backing the water on it was considered as 'taking' it within the meaning of the principle.

"In the case of *Gardner* v. *Newburgh*, 2 Johns. Ch., 162, *Chancellor* Kent granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the Act of the Legislature which authorized it, had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be idemnified. And he adds that the principles and practice of the English Government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of the defendants' counsel, would, like overflowing the land, be called only a consequential injury.

"If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

"But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. Ang. Wat., sec. 465 *a*; *Hooker* v. *N. Haven and Northampton Co.*, 14 Conn. 146; *Rowe* v. *Granite Bridge Co.*, 21 Pick., 344; *Canal Appraisers* v. *People*, 17 Wend., 604; *Lackland* v. *North Mo. R. R. Co.*, 31 Mo., 180; *Stevens* v. *Prop. of Middlesex Can.*, 12 Mass. 466. And perhaps no state court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision, than that of Wisconsin. In numerous cases of this kind under the Mill and Mill-dam Act of that State this question has arisen, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that Act was a public one, within the meaning of the Constitution, but it has never been doubted in any of those cases that it was such a taking as required compensation under the Constitution. *Pratt* v. *Brown*, 3 Wis. 613; *Walker* v. *Shepardson*, 4 Wis. 511; *Fisher* v. *Horicon Iron Co.*, 10 Wis., 353; *Newell* v. *Smith*, 15 Wis., 104; *Goodall* v. *Milwaukee*, 5 Wis., 39; *Weeks* v. *Milwaukee*, 10 Wis., 242. As it is the Constitution of that State that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us."

In United States v. Lynah, 188 U. S. 445, 47 L. Ed. 539, suit was brought to recover damages for flooding land in the

construction of an improvement to navigation of the Savannah river. It is said:

> "It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken. Does this amount to a taking? The case of Pumpelly v. Green Bay & M. Canal Co., 13 Wall. 166, 20 L. Ed. 557, answers this question in the affirmative. And on the argument it was conceded by the learned counsel for the government (and properly conceded in view of the findings) that so far as respects the mere matter of overflow and injury there was no substantial distinction between the two cases. In that case the Green Bay Company, as authorized by statute, constructed a dam across Fox river, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land. Referring to this it was said (p. 177, L. Ed. p. 560):
>
> "'The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.
>
> "'It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for

invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.' * * *

"It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner.

"Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others, it is an injury which is purely consequential, and for which the government is not liable. But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th amendment of paying just compensation.

"In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. Ed. 463, 471, 13 Sup. Ct. Rep. 622, 630, it was said:

" 'But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th amendment, and can take only on payment of just compensation.'

"In that case Congress had passed an act for condemning what was known as 'the upper lock and dam of the Monongahela Navigation Company,' and provided 'that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls should not be considered or estimated,' but we held that this proviso was beyond the power of Congress; that it could not appropriate the property of the navigation company without paying its full value, and that a part of that value consisted in the franchise to take tolls. So in the recent case of *Scranton v. Wheeler*, 179 U. S. 141, 153, 45 L. Ed. 126, 133, 21 Sup. Ct. Rep. 48, 53, we repeated the proposition in these words:

"'Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th amendment of the Constitution, and, of course, in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use.'"

In United States v. Cress, 243 U. S. 316; 61 L. Ed. 746, it is said:

"In Kentucky, and in other states that have rejected the common-law test of tidal flow and adopted the test of navigability in fact, while recognizing private ownership of the beds of navigable streams, numerous cases have arisen where it has been necessary to draw the line between public and private right in waters alleged to be navigable; and by an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right. Cases exemplifying these propositions are

cited in a marginal note. We have found no case to the contrary."

* * * * * * * *

"Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557, involved the right to compensation for land overflowed with backwater from a dam erected and maintained in the Fox river, under authority of the state of Wisconsin, for the improvement of navigation. (A permissible exercise of state power, in the absence of action by Congress, although it was an interstate navigable water. Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 251. 7 L. ed. 412, 414; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96). The raising of the river above its natural stage, by means of an artificial structure, was the *gravamen* of the complaint. It was argued that the state might, in the interest of the public, 'erect such works as may be deemed expedient for the purpose of improving the navigation and increasing usefulness of a navigable river, without rendering itself liable to individuals owning land bordering on such river, for injuries to their lands resulting from their overflow by reason of such improvements.' This court overruled the contention, and held there was a taking without compensation, contrary to the applicable provision of the Constitution of Wisconsin.

"In United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349, the same principle was applied in the case of an operation by the government of the United States. For the improvement of the navigation of the Savannah river certain dams and other obstructions were placed and maintained in its bed, with the result of raising the water above its natural height and backing it up against plaintiff's embankment upon the river and interfering with the drainage of their plantation. This was held (pp. 465, 471) to be a taking of private property, requiring compensation under the 5th Amendment, notwithstanding the work was done by the government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property thereby flowed.

"In several other cases the limitation of the public right to the natural state of the stream has been recognized. Packer v. Bird, 137 U. S. 661, 667, 34 L. ed. 819, 820, 11 Sup. Ct. Rep. 210; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 698, 43 L. ed. 1136, 1139, 19 Sup.

Ct. Rep. 770; Leovy v. United States, 177 U. S. 621, 631, 44 L. ed. 914, 918, 20 Sup. Ct. Rep. 797.

"It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude, confined to such streams as, in their ordinary and natural condition, are navigable in fact, and confined to the natural condition of the stream.

"And, assuming that riparian owners upon non-navigable tributaries of navigable streams are subject to such inconveniences as may arise from the exercise of the common right of navigation, this in like manner must be limited to the natural right. The findings make it clear that the dams in question, constructed by the government in the Cumberland and Kentucky rivers, respectively, are for raising the level of those streams along certain stretches by means of backwater, so as to render them, to the extent of the raising, artificial canals instead of natural waterways. In the language of engineering, the government has 'canalized' the rivers. We intimate no doubt of the power of the United States to carry out this kind of improvement. Nor do we doubt that, upon the completion of the improvements, these rivers: the Cumberland, because it is an avenue of communication between two states; the Kentucky and also the Cumberland, because, in connection with the Ohio and Mississippi rivers, they furnish highways of commerce among many states (Gilman v. Philadelphia, 3 Wall. 713, 725, 18 L. ed. 96, 99; The Daniel Ball, 10 Wall. 557, 563, 19 L. ed, 999, 1001; South Carolina v. Georgia, 93 U. S. 4, 10, 23 L. ed. 782, 783),—remained navigable waters of the United States for all purposes of Federal jurisdiction and regulation, notwithstanding the artificial character of the improvements (Ex parte Boyer, 109 U. S. 629, 632, 27 L. ed. 1056, 1057, 3 Sup. Ct. Rep. 434; The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 28, 48 L. ed. 73, 78, 24 Sup. Ct. Rep. 8.)

"But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power like others, must be exercised, when private property is taken, in subordination to the 5th Amendment. Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Lynah, 188 U. S. 445,

> 465, 471, 47 L. ed. 539, 546, 549, 23 Sup. Ct. Rep. 349. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams."

In King v. United States, 59 Fed. Rep. 9 (1893) an action was brought under the provisions of the act of congress of March 3, 1887, Chapter 359, Par. 1, 2, etc. to recover damages caused by raising the level of the water of the Savannah river and overflowing the plaintiff's plantation. In disposing of the case the court said,—

> "The government has not gone into actual occupancy of this land. But by reason of this public work, occasioned by the public work fulfilling its purpose, the water in the Savannah river has been raised at plaintiff's land, has been backed on it so that the drainage has been destroyed, the water kept on the land, and forced up into it, making it finally wholly unfit for cultivation. This is a taking of the land for public purposes, for which compensation must be provided. Pumpelly v. Green Bay Co., 13 Wall. 181."

In Williams et al. v. United States, 104 Fed. Rep. 50 (1900) proceedings were had under an act of congress to establish a claim against the United States growing out of the raising of the water of the Savannah river under the exercise of the power of congress to regulate commerce and to improve navigation. In disposing of the case the court said,—

> "The facts found show that by reason of the obstructions so placed in the Savannah river and the dumping of mud and sand therein, the water of the river has been directly backed up and against the banks of this plantation, and forced on the land; the superinduced addition of water actually invading it,

destroying its drainage, and through seepage and percolation raising the level of the water within the plantation to the level of the water in the river, and, in addition thereto, holding back and retaining in, over, and upon said plantation the freshets, the water from which was retained upon the same; by all of which the plantation has been rendered absolutely valueless. All of which is the result of the government improvements and works, and without which its purposes could not be carried out and effected. This is a 'taking,' within the meaning of the fifth amendment.

"The plantation of the plaintiffs being actually invaded by the superinduced addition of the water directly caused by the government dams, obstructions, and works backing up the water of the river, and raising the water level at and upon and in the rice plantation, and holding back and retaining upon the same the freshets, and making the same absolutely unfit for the cultivation of rice or any other known article, and plaintiffs having been compelled thereby to abandon their plantation, and being practically ousted of possession, and this being a permanent and continued condition, and the plantation being thereby rendered irreclaimable and become of no value, renders the action of the government a taking of land for public purposes, within the meaning of the fifth amendment to the constitution, for which compensation is due to the plaintiffs."

In Morris v. The United States, 30 Court of Claims, 162 (1895) proceedings were brought to secure compensation from defendant for the value of land appropriated and used by the government in the improvement of the Muskingum River, in the state of Ohio. In disposing of this case the court said,—

"Whatever may have been thought of the jurisdiction of this court in its early history, in cases where private property has been taken in the exercise of the right of eminent domain, it is now well settled by many decisions of the Supreme and this

court that upon the taking, as incident to the exercise of the power of eminent domain, there arises an implied contract, upon which a suit may be brought and successfully maintained in this court. The cases are so numerous setting the law in favor of the right to recovery that it is unnecessary to cite them."

In Jackson et al. v. The United States, 31 Court of Claims, 318 (1896), suit was brought to recover for land overflowed, washed away and for practical purposes destroyed by reason of the defendant's levees on the Mississippi River. The allegations of the petition were substantially identical with the declaration in *Pumpelly* v. *Green Bay*. In disposing of the case the court said,—

"In the present case the facts are also presented by the pleadings. The petition, which is confessed by demurrer, alleges that in the year 1883 the officers of the United States, in pursuance of the act of Congress creating the Mississippi River Commission, projected a system of public works for the purpose of so confining the waters of the river between lines of embankments or levees as to give increased elevation and velocity and force to the current, and have thus caused an increased and abnormal elevation in the waters of the river at the high water or flood stage. The petition also alleges that the effect of these public works is to,—'*Cause the plantation of petitioners, and others so situated, to be flooded annually by the waters of the river, and to destroy the crops growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences, and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand and gravel, and to render them unfit for cultivation, and to entirely destroy their value.*'

* * * *

"The material difference between this case and that of *Pumpelly* v. *Green Bay Company* is, that here

the overflow of the water was not continuous. But the essential fact is averred that the annual overflow of the claimant's lands in consequence of the Government's works is such as 'to render them unfit for cultivation and to entirely destroy their value.' In that essential this case is stronger than the other, for Mr. Justice Miller says that the facts averred are such as to show that the dam and consequent overflow 'worked an *almost* complete destruction of the value of the land.'

"It is true that here the claimant is free to go upon his land during the non-agricultural portions of the year; that is to say, after the spring and summer floods have passed away. But so was the plaintiff, in the other case, free to go upon his land while it was overflowed and do what he could with it. It is not an absolute taking of land which constitutes a taking of private property for public use. Mr. Justice Miller, quoting Angell on Water Courses and stating apparently the conclusion of the court, says that 'there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be equivalent to the taking of it, and that under the constitutional provision it is not necessary that the land should be absolutely taken.'"

In Beidler et al. v. The Sanitary District of Chicago, 211 Ill. 628 (1904) action of trespass on the case was brought by plaintiffs against the Sanitary District of Chicago to recover the amount expended by plaintiffs in deepening or lowering the canals, and in repairing certain docks fronting on said canals, and the south branch of the Chicago River, and for permanent injury to their lots. In disposing of the case the court said,—

"Section 13 of article 2 of the constitution of the State provides: 'Private property shall not be taken or damaged for public use without just compensation,' and the question is here presented whether

the damages sustained by appellants are within this language of the constitution.

"Section 19 of the act for the creation of sanitary districts provides: 'Every sanitary district shall be liable for all damages to real estate within or without such district which shall be overflowed or otherwise damaged by reason of the construction, enlargement or use of any channel, ditch, drain, outlet or other improvement under the provisions of this act.'

"In the case of *City of Kewanee* v. *Otley*, 204 Ill. 402, we held, (p. 417) referring to *Gardner* v. *Newburgh*, 2 Johns. Ch. 161, and *Simons* v. *Patterson*, 48 L. R. A. 717: 'It is the right of every owner of land over which a stream of water flows, to have it flow in its natural state and with its quality unaffected. The right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which the owner cannot be disseized except by due process of law, and the pollution of a stream constitutes the taking of property, which may not be done without compensation.'

* * * *

"In the case at bar, however, there was nothing in the condition or character of the property of the plaintiffs which rendered it either necessary or desirable that it should be taken or damaged in the exercise of the police power. It is evident that lowering the level of the water obstructed ingress to and egress from the lots in question, and following the reasoning of this court in *City of Chicago* v. *Jackson*, 196 Ill. 496, we hold that such obstruction is a damage to private property for public use, within the meaning of section 13 of article 2 of the constitution of this State, for which compensation may be recovered from the sanitary district, under and by virtue of section 19 of the act authorizing the creation of the district."

2. *If a riparian owner is deprived of the use and ordinary flow of water in its natural and normal height by artificial lowering of levels, so as to convert what was water area into land area, it constitutes a taking of property.*

Cohen v. United States, 162 Fed. Rep. 364;
United States v. Alexander et al., 148 U. S. 180: 37 L. Ed. 415;
Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453;
Meyers v. City of St. Louis, 8 Mo. Appeals 266;
City of Emporia v. Soden, 25 Kansas 588: 37 Am. Dec. 265;
Mayor and City Council of Baltimore v. Warren Manufacturing Co. et al., 59 Maryland 96;
Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393;
Proprietors of Mills and others v. Braintree Water Supply Company, 149 Mass. 478;
Fernald v. Knox Woolen Company, 82 Maine 48, 7 L. R. A. 459;
Kimberly & Clark Co. v. Hewitt and others, 75 Wis. 371;
Kimberly & Clark Co. v. Hewitt et al., 79 Wis. 334;
Cedar Lake Hotel Company v. Cedar Lake Hydraulic Co., 79 Wis. 297, 48 N. W. 371;
Watuppa Reservoir Company v. City of Fall River, 154 Mass. 305;
Rigney v. Tacoma Light & Water Company, 9 Wash. 576, 26 L. R. A. 427;
Waller v. State of New York, and Skaneateles Paper Company v. State of New York, 144 N. Y. 579;
Valparaiso City Water Company v. Dickover, 17 Ind. Appellate Ct. Repts. 233;
Priewe v. Wisconsin State Land and Improvement Co., 93 Wis. 534, 33 L. R. A. 645;
Smith v. Youmans, 96 Wis. 103: 70 N. Y. 1115;
Gehlen Brothers v. Knorr, 101 Iowa 700: 36 L. R. A. 798;
Neal v. City of Rochester, 156 N. Y. 213;
Baxter v. Gilbert, 125 Calif. 580;
Hyatt v. Albro, 121 Mich. 638;

Sanborn v. People's Ice Co., 82 Minn. 43, 83 Am. St. Rep. 401, 84 N. W. 641, 51 L. R. A. 829;
Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643; 51 L. R. A. 687;
New Whatcom v. Fairhaven Land Company, 24 Wash. 493; 54 L. R. A. 190;
Draper v. Brown, 115 Wis. 361, 91 N. W. 1001;
People v. Hulbert, 131 Mich. 156;
Wendel v. Spokane County, 27 Wash. 121;
Webster v. Harris, 111 Tenn. 668, 59 L. R. A. 324.

Cohen v. United States, 162 Fed. Rep. 364, (1908), was an action to recover compensation for the diversion of a water course. The court held that the *diversion* of the water of a non-navigable stream by the United States, so as to deprive a landowner of its natural flow adjacent to and upon his premises, for the purpose of improving the navigation of other navigable waters, is a 'taking of property' of such landowner, within the meaning of the fifth amendment to the Constitution, which entitles him to just compensation therefor. The court in its opinion said,—

> "The government has diverted the waters of Sausal creek at the point where it enters the subsidiary canal, and in effect has taken and appropriated the stream below that point, and the petitioner has been deprived of its flow adjacent to and upon her premises. This is a taking, within the constitutional provision."

In United States v. Alexander et al., 148 U. S. 180: 37 L. Ed. 415 (1893) appeal was taken by the United States to the Supreme Court from a judgment of the Court of Claims awarding damages for draining and destroying a well by the construction of a tunnel, under the Act of Congress of 1882, and it was held:

Under the Act of Congress of July 15, 1882, to increase the water supply of the city of Washington, those whose lands or property rights were directly injured by the construction of the work proposed to be done are entitled to damages for such injury, as well as those injured by the taking of their lands.

In Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 453, (1854) Burden brought suit against Stein to recover damages for the diversion of the water of a creek from plaintiff's mill. The court said,—

"If the legislature should authorize a public improvement by means of a canal, and the construction of the work would destroy or impair the value of private property, without affording the means of indemnification, the owner of the property destroyed or injured would have his action at law against those who caused the damage. Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466. In the present case, there is nothing in the statute from which the intention of the legislature to give the use of the water can legitimately be inferred; and the care with which they have guarded the rights of others, in requiring the consent of the owners of the land through which the canal passed to be given, and providing compensation for the injury which they might sustain, is, at least, persuasive to show that the legislature intended to grant no right which might be detrimental to others. The right to the use of the water intended to be used by the company, under certain conditions and limitations, belonged to the owners of the land through which it run. It is this right which is frequently the most valuable portion of the freehold, and is, in some senses, as much identified with it, as the soil of which it is composed."

In Meyers v. City of St. Louis, 8 Missouri Appeals 266 (1880) plaintiff was the owner of a mill upon the banks of the Mississippi River to which logs were brought by

utilizing a navigable stream. The defendants erected a dike twenty feet broad and seven hundred feet long in such a way as to cause the formation of a deposit of mud six feet deep and one hundred feet wide along the plaintiff's frontage, and thus depriving him of the usual and ordinary use of the river. In disposing of the case the court said,—

> "'Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and, among those rights, one is access to the navigable part of the river from the front of his lot—the right to make a landing, wharf, or pier, subject to such general rules and regulations as the Legislature may see fit to impose for the protection of the rights of the public, whatever these may be.' This is the language of Judge Miller in *Yates* v. *Milwaukee*, *10 Wall.* 504. * * *
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> "Undoubtedly, at common law, both in England and America, and under the common law and civil law doctrines as modified after the system of surveys established after the acquisition of the North-West Territory, every person owning on the banks of the Mississippi has a right that it should flow *ubi currere solebat*. *Bealey* v. *Shaw*, 6 East 208; *Delaplaine* v. *Railroad Co.* 42 Wis. 214; *Yates* v. *Milwaukee*, 10 Wall. 497; *Tyler* v. *Wilkinson*, 4 Mason, 397; *Tinicum Fishing Co.* v. *Carter*, 61 Pa. St. 21; 1 Dill. on Mun. Corp. sects. 70-72; *O'Fallon* v. *Daggett*, 4 Mo. 345. The right to have the river flow by his land as it flowed by nature, and the right of access to the river at this point, were rights of plaintiff as riparian owner, additional to his right as one of the general public to use the river as a highway. His rights to access were exclusive, subject to the general easement in the public to use the river for purposes of navigation, and to make a temporary landing there when the exigencies of the case might require it.

"And this right was the property of the plaintiff. 'It is a right,' says the Supreme Court of the United States, in *Yates* v. *Milwaukee* (*supra*), 'of which, when once vested, the owner can only be deprived in accordance with established law; and, if necessary that it be taken for the public good, upon just compensation.' 'Such riparian rights,' says Judge McLean in *Bowman* v. *Wathen*, 2 McLean, 376, 'frequently constitute the chief value of river property, and to deprive an owner of them without compensation is to despoil him of a most valuable property.'

"That the destruction of the riparian right of plaintiff was such a taking of private property as to come within the limitation on the exercise of the right of eminent domain contained in the State Constitution is clear, we think, both on reason and authority. On this point we may refer to most of the cases cited above, and also to *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *Eaton* v. *Boston, etc., Railroad Company*, 51 N. H. 504 (where the leading cases on the question as to what constitutes a taking of property, within the meaning of the constitutional limitation, are most exhaustively considered and carefully classified), and *Commissioners* v. *Kempshall*, 26 Wend. 404.

"It is urged that it is the settled doctrine in this State that a municipal corporation, in the absence of negligence, is not answerable in a civil action for consequential damages arising from the execution of a public work which it is authorized by the State to engage in. * * * * But the building of a dike into the Mississippi, by which its stream is diverted from a lot which derives its value from its water-front, cannot be assimilated to these cases of remote and consequential damage; and if, as we have seen, riparian rights are property, it cannot be said that this is not a taking of property."

In City of Emporia v. Soden, 25 Kansas 588; 37 Am. Dec. 265 (1881) the plaintiff brought suit against the city of Emporia alleging that he was the owner of real estate lying

on both sides of the Cottonwood River, upon which he had erected and maintained a flouring mill; that the city, without leave, license, warrant or authority of law, had erected and maintained upon the river above plaintiff's mills, a system of waterworks and was diverting the water of the river to the city of Emporia for the usual and ordinary waterworks purposes. The opinion of the court was by Justice Brewer, afterward of the Supreme Court of the United States. In disposing of the case the court said,—

> "A second matter of defense is this: While the undiminished flow of the stream is conceded to be the right of every riparian owner, yet this right has always been limited to this extent, that each riparian owner may, without subjecting himself to liability to any lower riparian owner, use of the water whatever is needed for his own domestic purposes and the watering of his stock. The city is a riparian owner, and, whether it uses little or much, it is simply taking for domestic purposes. Each individual citizen of Emporia may buy land on the banks of the river and then take for domestic uses whatever amount of water he needs. What the individual separately may do, the city, representing all the individuals, has done. Does the manner in which the result was accomplished make any difference in the right?
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> "This argument is plausible, but not sound. A city cannot be considered a riparian owner within the scope of the exception named. The amount of water which an individual living on the banks of a stream will use for domestic purposes, is comparatively trifling. Such use may be tolerated upon the principle *de minimis non curat lex*. It is a use which must always be anticipated, and may reasonably be considered as one of the benefits of the ownership of the banks of a natural stream. Every one proposing to utilize the power of running water should reasonably expect that the stream is chargeable with such a slight burden. It is only a fair equalization of rights. But the taking of water for the supply of a populous and growing city, stands upon an entirely different basis. No man can foresee this; and if it were tolerated, no one would dare to expend money in utilizing this power for

fear of its being soon taken from him without compensation, and with total loss to his investment. The city, as a corporation, may own land on the banks, and thus in one sense be a riparian owner. But this does not make each citizen a riparian owner. And the corporation is not taking the water for its own domestic purposes; it is not an individual; it has no natural wants; it is not taking for its own use, but to supply a multitude of individuals; it takes to sell."

In Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393 (1883) plaintiffs, owners and lessees of mills situated on the banks of Honeoye creek, brought suit to restrain the city from diverting the waters of Hemlock Lake, in Livingston County New York, with a supeficial area of approximately 1,828 acres. The court exhaustively discussed the character of the lake and creek, and the rights of riparian proprietors thereon. In disposing of the case the court said,—

"The exercise by a ruler of the right of eminent domain is always subject to the obligation of making compensation for the property taken. *(Gould* v. *Hudson River R. R., supra.)* Due regard for the distinctions existing between a public right and a public use, and also those between a sovereign and a proprietary right is essential to a just consideration of the rights of parties in navigable watercourses. While a sovereign may convey its proprietary rights, it cannot alienate its control over navigable waters without abdicating its sovereignty. (*Martin* v. *Waddell,* 16 Peters, 367.) A neglect to observe these distinctions has been the cause of much error in treating of these rights.

"In *Comm'rs.* v. *Kempshall,* Senator Verplank says: 'I cannot assent to the position that the conceded common-law authority of the State over such rivers, for the purposes of navigation, comprehends the right to divert the waters to other purposes of artificial navigation, wholly distinct from that of the river itself.' He then proceeds to state rules in apt and pertinent language, which we consider decisive of this case in its various aspects. 'The proprietor of the bed and bank of the stream has himself

no absolute property in the waters, but strictly a usufructuary interest appurtenant to his freehold. He can use the waters for his own benefit; but he may not divert them to the injury of his neighbors, or lessen their quantity, or detain them unreasonably. If such be the strict limitation of the proprietary right, can it be that the State, as the trustee of a special public servitude has a much less restricted right, and can divert or detain the waters for other uses? By its sovereign right of eminent domain, it undoubtedly may do so,' * * * 'but all these exercises of sovereign authority are alike "the taking of private property for public use," which the Constitution pronounces may not be done "without just compensation."' * * * We are, therefore, of the opinion not only that the State had no right to grant to the city of Rochester the use of the waters of Hemlock lake, to the detriment of the riparian owners upon the banks of the stream formed by its outlet, but that their rights were recognized and provided for by the act under which the defendant assumes to justify its acts."

In Fernald v. Kno. Woolen Company, 82 Maine 48, 7 L. R. A. 459 (1889) plaintiffs, the owners of lands fronting upon certain ponds, and also the owner of an island in one of these containing fifteen acres, brought suit to restrain the lowering of the level of these ponds by defendants. The court said:

"We think the injunction prayed for must be granted. We do not think the owners of mills on a stream, flowing from a great natural pond or lake, have a right to lower the outlet and draw down the water in the pond or lake below its natural low-water line.

"Such a right is inconsistent with the existence of the pond as a pond. If exercised to its fullest extent it would destroy the pond. All the water might be drawn out and its bed left dry, a mere stream of running water only remaining. And if exercised, to any extent, the necessary effect must be to widen the shores and deprive the adjoining land owners of their natural water frontage; for it is the settled law of this state that lands, bounded on a great pond or lake, extend only to the natural low-water line, and that all beyond is owned by the state. And this natural water frontage may be as valuable to the land

owner as the right to draw water is to the mill-owner. But whether of equal value or not, it is of equal validity in law, and entitled to equal protection.

"This precise question was recently considered in Massachusetts, and the court held that the water of a great pond could not be lawfully drawn down below its natural low-water line; that such a use of the water would be unreasonable; that great ponds belong to the public; that to draw down the water below its natural level is inconsistent with the common right to the use of the pond as a pond; that for such an abstraction of the water an information or an indictment would undoubtedly lie for the public wrong; and that an adjoining land owner thereby deprived of his natural water frontage could obtain redress by injunction. *Potter* v. *Howe,* 141 Mass. 357.

"As great ponds and lakes are public property, the state may undoubtedly control and regulate their use as it thinks proper. But in the absence of legislative authority, no individual or corporation can lawfully draw down the water of a great natural pond or lake below its natural low-water line."

In Kimberly & Clark Co. v. Hewitt, et al., 75 Wis. 371 (1890) plaintiff alleged its ownership of a water power on Fox river together with a dam; that defendants owned lands above plaintiff's dam across which a canal might be constructed to divert the water from the river which would otherwise reach the plaintiff's mill pond. The complaint was that the defendants threaten to and will, unless restrained by the judgment of the court, build a canal across their land and divert the waters of the river to the injury of plaintiff who alleged that it desired to use the power generated by all of the water of the river. Plaintiff demurred to the bill of complaint upon the general theory that an interlocutory injunction ought not to be issued until plaintiffs were actually injured. The court, in disposing of this case said:

"It is admitted that it is not necessary for a party to delay bringing a suit until after a nuisance is actually perpetrated, where the facts show an ability and a pur-

pose to proceed at once in the unlawful undertaking. This concession is a sufficient ground for sustaining the complaint; for it is alleged that the defendants threaten to divert the water, claim they have both the right and the ability to do it, and will, unless restrained. Within the authorities, the facts present a case for the exercise of equitable jurisdiction to prevent the threatened injury (*Attorney General* v. *Forbes*, 2 Mylne & C. 123; *Webb* v. *Portland Mfg. Co.* 3 Sum. 189; Angell on Watercourses, ch. X, subd. 11), the province of the injunction being to prevent future mischief; and where the right to do the wrong is insisted upon, the court will interfere and protect the plaintiff. It follows from these views that the order of the circuit court overruling the demurrer must be affirmed."

Subsequently this same case came before the Supreme Court of Wisconsin in Kimberly & Clark Co. v. Hewitt, et al., [illegible] Wis. 334, and in disposing of the case the court said:

"The rule is elementary that, unless affected by license, grant, prescription, or public right, or the like, every proprietor of land on the bank of a stream of water, whether navigable or not, has the right to the use of the water as it is wont to run, without material alteration or diminution; and no riparian owner has the right to use the water of the stream to the prejudice of other riparian owners above or below him, by throwing it back on the former or subtracting it from the latter." Lawson v. Mowry, 52 Wis. 219, and cases cited in the opinion by Mr. Justice Cassoday; Ang. Water-courses (7th ed.) Chp. 4, p. 98, note 2; Burrill, Law Dict. tit. 'Ut Currere Solebat.'"

In Cedar Lake Hotel Company v. Cedar Lake Hydraulic Co. 79 Wis. 297, 48 N. W. 371, (1891) plaintiff the owner of a hotel and several acres of ground on the shores of Big Cedar Lake used as a summer resort, brought suit against the defendant to restrain it from lowering the waters of the lake below their natural low water mark to the injury of complainants, and to plaintiff's bill of complaint the defendant demurred. Disposing of the case the court said:

"It is idle and frivolous to contend that the plaintiff has no such right or interest in the shore of the lake opposite said hotel property as to justify the interposition of the court or claim damages for so causing the lake to recede from its contiguity with it."

In Rigney v. Tacoma Light & Water Company, 9 Wash. 576, 26 L. R. A. 427 (1894) respondent instituted suit against the Tacoma Light & Water Company to restrain it from diverting the waters of Spanaway creek and of Upper Clover creek from their natural channels or polluting the same, and to compel it to remove the dams, flumes, ditches and filters placed therein and to restore the waters to their natural bed or channel. It is said:

"Not even a riparian owner has a right to divert a stream permanently from its natural course, and thus deprive others of their rights therein. Such an act, in itself, is wholly unlawful. *Crook v. Hewitt*, 4 Wash. 749 (31 Pac. 28). And the purpose for which the water diverted may be used makes no difference as to the force and effect of this rule. Accordingly it is said by Kerr that a diversion of water from a stream for the purpose of supplying a neighboring town with water is not a lawful user of the water. Kerr, Injunctions (2d ed.), p. 229."

* * * *

"The legal rights of riparian proprietors upon natural water courses are well settled and generally understood. Every such proprietor is entitled, in the absence of grant, license, or prescription, limiting his right, to have the stream which passes over or adjacent to his lands flow as it is wont by nature, affected only in quantity or quality by the consequences of a reasonable use thereof by other proprietors. See *Crook v. Hewitt, supra*, and *Lux v. Haggin*, 69 Cal. 255 (10 Pac. 674).

"The right of the riparian proprietor to the flow of the water is inseparably annexed to the soil, and passes with it, not as a mere easement or appurtenance, but as part and parcel of it. Use does not create, and disuse cannot destroy or suspend, it. *Johnson v. Jordan*, 2 Metc. (Mass.) 239; *Lux v. Haggin, supra*. The riparian proprie-

> tor has no property in the water itself, but a simple usufruct while it passes along. 1 Wood, Nuisances (3d ed.), p. 471. The right to the use of water flowing over land is identified with the realty, and is a real and corporeal hereditament. *Cary v. Daniels*, 5 Metc. (Mass.) 238. And this right is a substantial one, and may be the subject of sale or lease like the land itself. 1 Wood, Nuisances (2d ed.), p. 412."

In Valparaiso City Water Company v. Dickover, 17 Ind. Appellate Ct. Repts. 233 (1896) appellee brought suit for and recovered damages against appellant for an alleged wrongful diversion of the waters of Flint Lake, Porter County, Indiana. Plaintiff was a riparian proprietor thereon and the city of Valparaiso authorized the construction and maintenance of a system of waterworks to supply the city and its inhabitants with water to be obtained from Flint Lake. The waterworks system was constructed and placed in operation and the appellant commenced to pump water from the lake to supply the city with water. Plaintiff purchased the land with full knowledge that the water was being diverted from the lake for water works purposes. In disposing of the case the court said,—

> "A riparian proprietor has not the right to divert the stream permanently from its natural course, and thus deprive others of their rights therein; and the purpose for which the water diverted may be used (as, to supply a neighboring town with water) makes no difference as to the force and effect of this rule."

In Priewe v. Wisconsin State Land and Improvement Co., 93 Wis. 534, 33 L. R. A. 645 (1896) suit was brought for an injunction to restrain the lowering of the level of Muskego Lake in Waukesha county, Wisconsin, to the injury of the riparian proprietors. In disposing of the case the court said,—

"In this state it has been repeatedly held that the riparian proprietor upon navigable lakes and ponds takes the land only to the water's edge, but that, as such proprietor, he has the exclusive right of access to and from the lake in front of his land, and of building piers and wharves there in aid of navigation, not interfering with the public easement; that such private rights grow out of his title to the land, and have a pecuniary value, and their destruction or material abridgment is generally an injury, entitling him to redress. * * *

"Certainly, one such riparian owner, without leigslative authority, has no legal right to draw the water from such lake, to the injury of other such riparian proprietors thereon. *Sampson* v. *Hoddinott,* 87 Eng. C. L. 590; *Wilts & Burks Canal Nav.* v. *Swindon Water Works Co.* 9 Ch. App. 451; *S. C.* L. R. 7 H. L. 697; *Miner* v. *Gilmour,* 12 Moore, P. C. 156; *North Shore Co.* v. *Pion,* 14 App. Cas. 621; *Miller* v. *Miller,* 9 Pa. St. 74; *Lawson* v. *Mowry,* 52 Wis. 219; *Kimberly & Clark Co.* v. *Hewitt,* 79 Wis. 334. Assuming that the state had plenary power over the lake in question and the land beneath its waters, when exercised in aid of commerce or any other legitimate public purpose, yet we are constrained to hold that it had no power to arbitrarily take away or destroy such rights of the plaintiff, as such riparian owner, without his consent, and without compensation, and without due process of law, and for the sole purpose of benefiting some other riparian owner, or for any other mere private purpose. *Arimond* v. *Green Bay & M. Canal Co.* 31 Wis. 316; *S. C.* 35 Wis. 41; *Barden* v. *Portage,* 79 Wis. 126; *Cedar Lake Hotel Co.* v. *Cedar Creek Hydraulic Co.* 79 Wis. 297; *Wis. Water Co.* v. *Winans,* 85 Wis. 39; In re *Theresa Drainage Dist.* 90 Wis. 301; *Grand Rapids* v. *Powers,* 89 Mich 94."

The court expressly approved its previous holding in Cedar Lake Hotel Company v. Cedar Lake Hydraulic Co., 79 Wis. 297.

In Gehlen Brothers v. Knorr, 101 Iowa 700; 36 L. R. A. 798 (1897) suit was brought by plaintiffs to restrain defendants from erecting a dam across Floyd River, which would inter-

rupt the natural flow of water in the river to plaintiffs' detriment. Plaintiffs owned and operated a grist mill, operated by water power derived from the river and established its right to the flow. Defendants constructed a dam for the purpose of creating a pond from which to harvest ice. In disposing of the case the court said,—

> "Broadly stated, the general rule is that the owner of the land through which a stream of water runs, has a right to have it flow over his land in the natural channel, undiminished in quantity, and unimpaired in quality, except insofar as diminution or contamination is inseparable from a reasonable use of such water."

In Baxter v. Gilbert, 125 Calif. 580 (1899) suit was brought to test the rights of plaintiffs and defendants to the waters of Little Pine and Pinyon creeks, and the waters of certain lakes situated higher up in the mountains and forming in a great measure, the source of supply of Little Pine creek. The court said,—

> "It necessarily follows that it was not the overflow of the creek that appellants sought to appropriate, but a certain amount of water in these two aforesaid described lakes. If such appropriation of waters does not interfere with the usual and ordinary quantity of water flowing down the creek, the right of appellants to appropriate is undoubted; but otherwise, if there be an interference with the quantity of water flowing down the stream. If the tapping of these lakes by appellants reduces the amount of water to which plaintiffs are entitled, or shortens the period of time in which they might otherwise secure water from the creek, then the acts of appellants clearly are a trespass upon plaintiff's rights—exactly the same kind of trespass as though the creek was tapped and that amount of water directly taken therefrom without any molestation of the lakes."

In Hyatt v. Albro, 121 Mich. 638 (1899) complainants, the owners of a mill on the outlet of Tupper Lake and Mud Lake

filed a bill to restrain the defendant from diverting the natural channels of the Shiawassee river above such lakes so as to interfere with the usual and ordinary flow of the water to complainants' mill. In disposing of the case the court said,—

> "The complainants have the right to have the water flow naturally, without being accelerated or impeded, except to the extent that the concurrent rights of the upper riparian proprietors may effect such results. In so far as the proper use of the stream above results in inconvenience, or impedes the use of the stream by complainants, it is *damnum absque injuria*. Has the upper riparian owner the right to reclaim a portion of this lake by so accelerating the flow of the stream as to lower the water in the lake, thereby narrowing the area so as to reclaim overflowed lands? This accumulation of water from the overflow of the banks of the lake, fed by the Shiawassee river above, cannot be called surface water. *West* v. *Taylor*, 16 Or. 165; *Schaefer* v. *Marthaler*, 34 Minn. 487 (57 Am. Rep. 73); *Macomber* v. *Godfrey*, 108 Mass. 219 (11 Am. Rep. 349); Gould, Waters, Par. 264; *Stock* v. *Township of Jefferson*, 114 Mich. 357 (38 L. R. A. 355). The right to drain surface water is clear. Gould, Waters, Par. 265. But the right to drain any portion of the waters of these lakes above, which constitute the source of supply to the complainants' water-power, would unquestionably be a wrong against complainants if the water were diverted from the stream. Is it any the less an interference with the complainants' property rights if the water be precipitated in an artificial manner by means of a deepened channel through the stream itself? We think not. On the contrary, this increasing of the flow, it is alleged with much force, would work an additional injury by imperiling complainants' dam. The circuit judge was of the opinion that the flow of water would not be diminished by the deepening of the river. We think it clear, however, that by the deepening of the channel the water will be carried off more rapidly than it now is. Indeed, if it is not expected that this will be the result of the improvement, we are at a loss to understand why it was undertaken."

In Sanborn v. People's Ice Co., 82 Minn., 43, 83 Am. St. Rep. 401, 84 N. W. 641, 51 L. R. A. 829 (1900), complainant a ripa-

rian proprietor upon White Bear lake had erected thereon certain improvements, the principal value of which consisted in their use in connection with the waters of the lake. White Bear lake was contiguous to St. Paul, Minneapolis and Stillwater and was used as a resort. The defendant corporation cut and removed many thousand tons of ice from the lake for commercial purposes, and the action was brought to restrain the defendants from cutting and removing any further ice. In disposing of the case the court said,—

> "If there is a remedy for an injury caused by the artificial raising of the water above the natural line, thus flooding a meadow, there is also a remedy to prevent exposure of an unsightly and unhealthy marsh by artificially drawing off the water below the natural level. It is immaterial for what purpose the shore land is used, if it be a lawful use. There is no distinction in this respect between a farm and a summer residence. Employment of contiguous land for the purpose of pleasure, recreation, and health, constitutes such a use of adjacent bodies of public water as to command a remedy for an interference with its natural condition."

In Strobel v. Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643; 51 L. R. A. 687, (1900) suit was brought by plaintiffs, owners of various mills on Oatka Creek, against the defendant, a salt manufacturer above the mills, to restrain him from diverting or polluting the waters of the creek. In disposing of the case the court said,—

> "A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its

natural size, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common-law is still in force: *aqua currit et debet currere, ut currere solebat.* Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners."

In Draper v. Brown, 115 Wis. 361, 91 N. W. 1001 (1902) a bill was filed by plaintiffs against defendants who were mill owners at the outlet of Fowler lake, to restrain them from drawing off the water, thereby lowering the level of the lake four feet. To this bill of complaint the defendants demurred on the ground that the complaint did not state a cause of action and for other reasons. This demurrer was overruled and the case went to the Supreme Court. The court said,—

"We then have the one primary right of the plaintiffs to have the water of Fowler Lake remain at its accustomed level. We have the corresponding duty of the defendants not to interfere with such right. We have also a wrongful violation of the plaintiffs' right by the defendants, Brown and Peacock, in unnecessarily drawing off the water, and the concurrent acts of the other defendants in withholding the natural and accustomed flow of water into the lake. Thus we find a single, complete cause of action, in which all of the defendants are interested, although acting independently and without concert."

In Wendel v. Spokane County, 27 Wash. 121 (1902), plaintiff brought suit to recover damages from defendant for draining a lake in the construction of a highway. In disposing of the case the court said,—

"It might as well be said that if the roadbed was covered with boulders, they could be rolled off by order of the county onto adjoining lands, or that the county could sluice mud or water from the roadbed onto adjoining lands or even lands at a distance, and shift the liability to the individuals who did the work. * * *

"It is insisted that there is no allegation of carelessness or negligence in the complaint. No such allegation is necessary. If the allegations of the complaint are true, it is the taking of private property for public use without compensation, and falls within the prohibition of the constitution (art. 1, Par. 16) so often construed by this court. And it makes no difference whether it was done negligently or carefully. The taking is what the constitution prohibits. *Brown* v. *Seattle,* 5 Wash. 35 (31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161); *State ex rel. Smith* v. *Superior Court of King County,* 26 Wash. 278 (66 Pac. 385)."

In Webster v. Harris, 111 Tenn. 668, 59 L. R. A. 324 (1902), was involved a title to ownership and navigability of Reelfoot Lake. Harris, assuming to be the owner of the soil under the waters of the lake, began the construction of a canal for the purpose of draining the lake into the Mississippi River. Thereupon complainants, the owners of lands, hotels, clubhouses, fish docks and other property situated along the shore of the lake, filed a bill to restrain the defendant from so doing. The court said,—

"We entirely concur with the conclusions reached by Judge Swiggart on this branch of the case, which are thus expressed in his learned opinion, viz: 'It must therefore follow, from the rules laid down in these authorities, and in others on the subject of the rights of riparian owners on rivers and lakes and other waters, whether navigable or non-navigable in any sense, that no one, whether he is only a stranger, or is himself a riparian owner on the same body of water, has any right to impair or destroy the interest and the use of such riparian owner to such water. In the language of Washburn (Easements, 316):

"The right to enjoy this flow of water without disturbance or interruption by any other proprietor is one *jure naturae* and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself in its natural state, unaffected by the tortuous acts of a neighboring landowner. It is an indispensable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right." The flow of water cannot be diverted, and turned into a different channel. It cannot be lowered by drainage or other artificial means from its natural level or height. It cannot be raised or increased in volume or level by damming or other means. It cannot be polluted or corrupted, and made less fit for use, wrongfully and unnecessarily. The riparian owner cannot be deprived of any of the many uses he has the right to make of the water, or injuriously affected in that respect.' "

7. THIS DIVERSION OF WATERS FROM LAKE MICHIGAN IS NOT GOVERNED BY THE AUTHORITIES CITED BY THE SPECIAL MASTER; THIS DIVERSION IS NOT AN "INCIDENTAL DAMAGE" NOR IS IT *DAMNUM ABSQUE INJURIA.*

The Special Master attempts to dispose of the property rights of the State of Michigan and other States bordering upon the Great Lakes by saying: (M. R. 151)

"The causing of *incidental damage* through the exercise of the *constitutional authority of Congress* does not constitute a taking of property for public use. * * * It is a case of *damnum absque injuria.* * * * The decisions which have been cited, and the principle they apply, seem to me to dispose of the contention that, in this instance, *if it be assumed that the diversion has been authorized under action of Congress, otherwise competent,* the property of complainant States has been taken in violation of the Fifth Amendment. *Where, pursuant to governmental authorization otherwise valid,* there is an obstruction of water from navigable lakes and rivers and a consequent lowering of levels by enlarging or opening outlets, the *incidental damage* to riparian owners

affords no ground for asserting the constitutional invalidity of that action."

Before entering upon a discussion of these cases it will be noticed that in his conclusions the Special Master assumes,—

1. The Constitutional authority of Congress. (That the work is for a constitutional purpose.)

2. An affirmative act of Congress. (That there was an exercise of the power of Congress.)

3. That the work was by or for the Federal government.

4. That the work caused an "incidental damage."

But indulgence in these presumptions destroys any proper application of these cases to the instant case. A review of the cases discloses that they present entirely distinguishable facts, and are based upon affirmative acts of Congress. The assumptions relied upon by the Special Master do not exist with respect to the diversion of these waters from Lake Michigan.

(a) *In each of the cases cited by the Special Master the work was for a constitutional purpose; it was authorized by an act of Congress; and it was done by or for the Federal government.*

A review of the cited authorities (M. R. 151) discloses that in all of them the work considered was for the benefit of navigation or some other constitutional purpose. No question was raised in any case as to the constitutional authority of Congress to authorize the particular work, except in South Carolina v. Georgia, 93 U. S. 4, which will be dealt with hereunder. In each case there was some affirmative act of Congress authorizing the particular work and in each case there was some improvement or benefit by or for the Federal government to a navigable channel.

1. South Carolina v. Georgia, 93 U. S. 4.
Purpose—Improving channel for navigation.

Authority—Appropriation act of Congress for specific work.
Work—By and for government in use of river.

In discussing the improvement of the southern channel at the expense of the northern by increasing the flow of water through the former, thus increasing its depth and navigability, the court said:

> "The action of defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the waterway of one of its channels and compelling navigation to use the other channel, but it is a means employed to render navigation of the river more convenient; a mode of improvement not uncommon. *The two channels are not two rivers,* and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation."

From the foregoing it is clear that a different rule would have been adopted had there been two distinct rivers or waterways instead of one, which divided in passing an island. The language used by this court did not apply to two navigable waterways, one of which was destroyed for the benefit of another (even though for a constitutional purpose). In the instant case two distinct waterways are involved, namely: the Great Lakes-St. Lawrence system, and the Chicago-Illinois River system (if it may be called a waterway for navigation at all). It is not a case of improving one part of a river at the expense of the other, but of destroying a substantial portion of the navigable capacity of the one for the effecting of an unconstitutional purpose (sanitation) in the other.

2. Gibson v. United States, 166 U. S. 269.
Purpose—Improving navigable channel (dike).
Authority—Appropriation by Congress for work.
Work—By and for government in use of river.

3. Scranton v. Wheeler, 179 U. S. 141.
Purpose—Improving utility for navigation (pier).
Authority—Appropriation act of Congress for specific work.
Work—Pier—used by and for Federal Government in use of channel.

4. C. B. & Q. v. Illinois, 200 U. S. 561.
Purpose—Enlarging and deepening water-course (drainage).
Authority—Specific act of Illinois Legislature authorizing work.
Work—By and for State and municipal subdivision.

5. West Chicago Street Railway v. Illinois, 201 U. S. 506.
Purpose—Deepening navigable channel.
Authority—Special act of Congress for specific work.
Work—By and for Federal Government in use of river.

6. Union Bridge Company v. United States, 204 U. S. 364.
Purpose—Improving navigable capacity—for larger vessels.
Authority—Section 18 of the Act of March 3, 1899.
Work—By and for Federal Government in use of river.

7. Philadelphia Company v. Stimson, 223 U. S. 605.
Purpose—Improvement of navigation (harbor lines).
Authority—Section 11 of the Act of March 3, 1899.
Work—By and for Federal Government in use of river.

8. Chandler-Dunbar Water Company v. United States, 229 U. S. 53.
Purpose—Deepening and clearing of St. Mary's River.
Authority—Special Act of Congress, March 3, 1909.
Work—By and for Federal Government.

9. Jackson v. United States, 230 U. S. 1.
Purpose—Improvement of channel (dike).
Authority—Specific act of Congress for work on Mississippi River.

Work—By and for Federal Government in use of river.

10. Greenleaf-Johnson v. Garrison, 237 U. S. 251.
Purpose—Improvement of channel (harbor lines).
Authority—Section 11, Act of March 3, 1899.
Work—By and for Federal Government in improvement of channel.

11. Willink v. United States, 240 U. S. 572.
Purpose—Improvement of navigable channel (harbor lines).
Authority—Section 11, Act of March 3, 1899.
Work—By and for Federal Government in use of channel.

12. Horstmann Company v. United States, 257 U. S. 138.
Purpose—Irrigation project.
Authority—Special Act of Congress for specific work.
Work—By Government for improvement of channel.

13. United States v. River Rouge, 269 U. S. 411.
Purpose—Improvement of navigable channel (eminent domain).
Authority—Act of Congress, Rivers and Harbors appropriation for specific work.
Work—By and for Federal Government in improvement of channel.

From the foregoing it appears that in each case there was an *affirmative act of Congress* reposing authority in the Secretary of War to do the particular work in question, either by specific act outlining the work itself, such as occurred in Chandler-Dunbar Water Company v. United States, *supra*, or by appropriations for the particular work such as occurred in Scranton v. Wheeler, *supra*, or by Sections 11 and 18 of the Act of March 3, 1899, affirmatively reposing discretionary authority in the Secretary of War to determine whether or not a bridge was in fact an obstruction to navigation. In each case there was an affirmative act of Congress delegating

authority to the Secretary of War to do the particular work which was done, whereby the alleged damage occurred.

In each of the foregoing cases another singular circumstance is worthy of mention. It was *admitted* that the work was an improvement, betterment, or advancement *for navigation,* and even in South Carolina v. Georgia, *supra,* it was frankly admitted that *navigation* in the southern channel would be improved to the point where that channel would be navigable for large boats which could not previously have used either one of the two branches because both divided the available navigable capacity of the river, and it was conceded that the result of the particular work engaged in by the Secretary of War was *beneficial as a matter of fact to navigation.* In the instant case, on the contrary, we search the record in vain to find any claim that *navigation* is improved in either the Great Lakes or in the Chicago-Illinois waterway. Hence each of these cases contains the unqualified major premise that the purpose was *for the improvement of navigation* in every respect.

In further contrast it is remarkable that in each of these cases the Federal Government undertook the work itself by or for *its own system* of river or harbor improvement. In none did it undertake to give authority to a *non-federal agency for a non-federally adopted waterway.* In the instant case, on the other hand, without any affirmative adoption of the artificial channel of the Chicago Sanitary Canal by Congress or by the Federal Government, and without any participation in the enterprise, except by inspection from time to time, a river has been diverted and reversed and large amounts of water abstracted from Lake Michigan for a strictly private or *non-federal enterprise.*

In United States v. Cress, 243 U. S. 316; 61 L. Ed. 746, many of these cases were reviewed. In that case, the court having held that the riparian proprietor had the right to have the water flow past his premises without burden or hindrance imposed by artificial means, and having held that if the government of the United States raised the water so as to overflow the lands of such riparian proprietor, it constituted a taking within the meaning of the fifth amendment to the constitution of the United States, entitling such riparian proprietor to compensation; and having cited with approval the case of United States v. Lynah, 188 U. S. 445; 47 L. Ed. 539, proceeded to discriminate all of the cases cited and relied upon by the defendant which had been decided prior to the decision in United States v. Cress. In that case it is said:

> "These cases have no proper relation to cases such as Gibson v. United States, 166 U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. Rep. 578, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; Scranton v. Wheeler, 179 U. S. 141, 153, 45 L. Ed. 126, 133, 21 Sup. Ct. Rep. 48, which likewise had to do with the interruption of access from riparian land to a navigable channel; Bedford v. United States, 192 U. S. 217, 225, 48 L. Ed. 414, 417, 24 Sup. Ct. Rep. 238, where the damage to claimant's land resulted from operations conducted by the government 6 miles farther up the river; Jackson v. United States, 230 U. S. 1, 23, 57 L. Ed. 1363, 1374, 33 Sup. Ct. Rep. 1011, where owners of lands on the east bank of the Mississippi claimed compensation as for a taking of their property by reason of the effect of levees built on the west bank opposite their lands as a part of a system of levees designed to prevent crevasses, retain the water in the river and thus improve the navigation. In each of these, there was no direct invasion of the lands of the claimants, the damages were altogether con-

sequential, and the right to compensation was denied on that ground."

b. *In each of these cases cited by the Special Master the work caused an "incidental damage."*

A review of the cited authorities (M. R. 151) discloses that in all of them the work caused an "incidental damage." It is not necessary to review each one at length because they group themselves into definite divisions for consideration.

1. Cases involving harbor lines, piers and dikes which interfere with access to navigable channel by riparian or upland owner.

This class of cases involves an "incidental damage" because it is a casual, subordinate or minor result following a federal improvement. The main consideration is the benefit to navigation and if in the course of the principal work and as an incident thereof, *inconvenience* arises, it is an "incidental damage."

2. Cases involving removal of bridges, culverts and subways for the deepening and clearance of channels.

In this class of cases the private interests were bridging over or tunneling under a water course doing so knowing that the work was subject to the paramount right of the federal government to change or alter such obstructions.

3. The class of cases involving deepening, widening, narrowing and clearing a navigable channel.

In this class of cases the riparian owner is directly benefited by the Federally adopted improvement and any indirect

inconvenience attendant upon such direct improvement is "incidental."

4. The class of cases represented by Horstmann Co. v. United States, 257 U. S. 138, respecting percolating waters.

In this class of cases percolating waters do not flow in fixed channels but are treated as part of the land and if a riparian proprietor is injured by being deprived of percolating waters or by being subjected to an increased flow, he has no right of action to recover damages because "there was no reason to believe that the construction of the government's works would cause the injury."

5. The class of cases where there has been a temporary overflow or diversion.

In the case of Sanguinetti v. United States, 264 U. S. 146, 149, it was said it must appear that there has been "an actual permanent invasion of the land, amounting to an appropriation of, and not merely an injury to the property." (M. R. 150, 151). But it will be noticed as the court pointed out in that case that mere injuries to property might not constitute a taking, but if the taking or overflow of the premises was a direct, natural and necessary result of the structure, and the land was so overflowed as to constitute an actual permanent invasion of the land amounting to an appropriation of it, or some part of it, then and in such case it constituted a taking of the property. In that case it was not shown that the overflow was a direct or necessary result of the structure complained of. It was not shown that there was any permanent impairment of value. It was not shown that it was an ousting of complainant from possession or a change in the character of the property or a permanent invasion of the land. In the instant case, on the contrary, there has been a direct, natural

and necessary result. Six inches of all the surface of Lake Michigan have been definitely, actually and *permanently diverted,* abstracted and removed, amounting to an appropriation of that much of the navigable capacity of all of the ports and harbors and connecting waters, and amounting to a taking of that portion from fishing and hunting grounds, beaches at summer resorts, public parks, and other property rights of complainant and her people. This is not a *temporary* diversion of water. It has been *permanently* lost to the Great Lakes-St. Lawrence watershed (M. R. 23).

Where the agency through which a trespass is committed is permanent in character and such as to necessarily presuppose a continuance or repetition of the wrong, the injured party has the option of treating the damage as permanent, and as such to be recovered in a single action or through recourse to successive actions.—II. Farnham on Waters, Sec. 589.

This is not an action for damages but for an injunction to restrain the continuance of an unlawful abstraction and diversion of water, and where there has been a permanent abstraction of six inches of the water's surface of the Great Lakes and their connecting waters, which has been permanently taken by defendants, and where that taking continues and is proposed to be continued indefinitely, it constitutes a permanent taking for all purposes of the rule announced in the Sanguinetti case.

CONCLUSION.

The issues of this case are far reaching and vitally affect the interests of the whole nation. They are of a magnitude not easily exaggerated. More than one-half of the population and wealth of our nation are represented and directly con-

cerned in the outcome of this case. Great industrial and commercial centers, directly affected by the diversion of these waters from Lake Michigan, are interested in these questions. The rights ~~of property of the~~ Lake States and their people depend upon the decision of the principles involved.

Outstanding above every other consideration is the maintenance of the *status quo* of the greatest inland water-way in the world. Whether this Great Lakes-St. Lawrence system shall be continued substantially as nature provided, for navigation and commerce, and so as to provide an opportunity for further development and improvement, whereby ocean traffic may be accommodated to and from the Atlantic Ocean, and other vast considerations, are involved in the protection and preservation of its *status quo*. If defendants can lower the levels of the Great Lakes system six inches, then they can lower these levels six feet so far as the question of principle is concerned. The one has already been determined by the Special Master to be a substantial interference with navigation, and the other would simply enlarge upon the amount of damage. In either event if defendants may substantially lower the levels of the Great Lakes, then the Dominion of Canada may enlarge the Welland Canal and lower the water of Lake Erie to the point where it would constitute a river instead of a lake. Likewise Canada could divert the water of the Great Lakes from Georgian Bay so as to affect the navigable capacity of all of the lakes and connecting waters; New York might open a waterway across that State tc the New York Harbor; Ohio might divert water from Lake Erie across the State of Ohio into the Ohio River; and likewise each city on the Great Lakes might do what Chicago has done, and each State and the Government of Canada, acting independently, might vie with each other for the water of the Great Lakes, for their own particular purposes, until it might become a free-for-all contest for these waters.

It was the intention of the constitution and the laws made in pursuance thereof that these waterways should be preserved forever for the benefit of all of the people of all of the states and foreign governments who have occasion to use these waters for navigation, or in any other lawful manner. This unbridled desire by defendants, if held lawful, may lead to a multiplicity of diversions and excesses for private and local enterprises under the guise of navigation or some other claimed constitutional purpose which will soon take the entire navigable capacity of the Great Lakes and ruin this ancient highway of commerce.

The State of Michigan has no objection to the sanitary disposal of the sewage of Chicago, but it does object to defendants doing so at the expense of property rights of Michigan and her people, under the guise of improving navigation, which is a hollow sham used by defendants to cover up their real purpose of sewage disposal and water-power exploitation. The State of Michigan can have no objection to the ultimate consummation of plans for a waterway from Chicago to the Gulf of Mexico, but it objects to any masquerading of purpose by defendants until such a system of waterways is definitely, positively and affirmatively authorized, approved and adopted by the Congress of the United States, in which event considerations of national scope may be deliberated before any attempt is made to abstract the vital necessities of navigable capacity from the Great Lakes-St. Lawrence system, and donate them to a scheme of doubtful practicability. The State of Michigan does object, as it has a right to object, to the wilful, wanton and unconscionable taking of its property without just compensation for the purposes of carrying out either sewage disposal or water-power projects, and especially in the absence of any affirmative act of Congress. Michigan contends that under the constitution and laws of the United States it is entitled to the natural and normal flow of the waters of the Great Lakes and their

connecting waterways and that this constitutes a property right; that any invasion of this right, to become authorized, must have some affirmative act of Congress definitely establishing such a far reaching policy of obstruction, and that nothing except an act of Congress can authorize the taking of these waters; and even assuming an Act of Congress authorizing the taking, the property so taken must be so compensated as to effect a constitutional diversion of the waters of Lake Michigan.

If there is to be a balancing of equities in arriving at a decision of the issues in this case, there certainly can be no fair comparison between the position of Chicago and that of complainant and her people.

Chicago has not played fair with either the Federal Government or the lake states in this abstraction of water. From the very beginning Chicago has demonstrated an utter disregard for the rights of sister states, as well as the Federal Government. As early as April 24, 1899, the United States District Engineer at Chicago said: (J. R. 133)

> "It is a strange fact that this city has expended or will expend over $30,000,000 with the intention of diverting an apparently unlimited amount of water from the Great Lakes to the Mississippi drainage area for sanitary purposes without finding out whether such diversion would be allowed by the great interests of the United States and the colonies of Great Britain along the chain of great lakes in the navigation of the rivers and harbors of the Great Lakes."

Defendants went into this matter with intention to abstract water from the Great Lakes without regard for the rights of others or the use being made of these vast waterways for navigation and commerce. Later, in 1908, when the abstraction had proceeded to the point where the Federal Government denied an application for an increase, the United States suffered the indignity of having its authority flouted

and defied by Chicago. Accordingly, a bill of complaint was filed in the Federal Court at Chicago in 1908, to enjoin and limit the diversion within some bounds. Undeterred by the Government's action defendants continued to take increasing quantities of water from Lake Michigan for their own purposes. From 1908 until 1925 when this Court enjoined an unlawful diversion the War Department for fifteen years patiently abided Chicago's wilful abstraction. Defendants had the benefit of all that delay, making full use of their opportunity, with disastrous effects upon complainant's rights. At that time lack of a permit from the War Department did not bother defendants. In fact it never seems to have meant much to the defendants except as a defense in this case. Following the decision of this court in Sanitary District v. United States, 266 U. S. 405, on January 5, 1925, Chicago immediately changed front. Instead of defiance, it began urging its self-created exigency, claiming that pestilential conditions would result if the amount of its unlawful diversion were not legalized by permit. But had Chicago caused sewage disposal plants to be built years ago when other cities began, instead of using the waters of Lake Michigan as a cheap solution for its sanitary problem, it would not have necessitated an unwilling and reluctant permission from the Secretary of War to save the situation for "humanitarian reasons."

The plight of Chicago is not one, however, for defendants to address to the Secretary of War, nor even to this Court. The problem is one for Congress, (to the extent of its power) and is one for the demonstrated ingenuity of Chicago.

To establish an equity defendants have urged their expenditures.

> "The construction cost of these works, as it appears on the books of the Sanitary District of Chicago, to December 31, 1926, amounted to $83,689,636.42, and, with the addition of administration, legal, clerical and incidental expenses, and interest on bonds for construction, to $109,021,613.21." (M. R. 21.)

As to this situation this Court remarked in Sanitary District v. United States, 266 U. S. 405, 431:

> "The investment of property in the canal and the accompanying works took the risk that Congress might render it valueless by the exercise of paramount powers. It took the risk without even taking the precaution of making it as sure as possible what Congress might do."

But contrast with this claim of Chicago the millions of dollars of wealth represented by the states, ports, harbors, inner harbors, industrial enterprises, summer resort beaches, and countless other financial investments of the people residing upon the Great Lakes, directly or indirectly dependent upon the continuance of this great waterway system at its normal, natural level.

If exigency is to govern as is to be inferred from this language—

> "In considering the validity of the permit of March 3, 1925, the exigency as it then existed, must be considered." (M. R. 192.)

the "exigency" contemplated was an exigency in sanitation or sewage disposal. It was no exigency requiring water for *navigation* on the Chicago River or sanitary canal. Contrast this with the exigency which was created upon the Great Lakes and their connecting waters, which involved the property rights of millions of people and their ability to navigate the *critical points* in the connecting waters as well as countless harbors and inner harbors, beaches and other places where a definite *exigency in navigation* actually occurred. Hence the question is reduced to whether an exigency in sewage disposal is of more importance than an exigency in navigation, in considering constitutional purposes.

Balancing the equities of commerce and navigation on the Chicago River, Sanitary Canal and Illinois River, with that upon the Great Lakes and their connecting waters, we find: "the present commerce on the Illinois River is small. It appears that in 1925 the total commerce both ways was 96,080 tons, in the same year the total freight traffic over the Chicago drainage canal was 688,295 tons, 97 per cent of which consisted of stone, largely removed from the spoil banks along the canal." (M. R. 119.) On the other hand the commerce and navigation of the Great Lakes at the same time amounted to over 210,000,000 tons annually, and when the saving and cost of transportation by water from cost of transportation by land is over $150,000,000 annually it means that this amount computed at the rate of five per cent represents a saving on a capital investment of more than $3,000,000,000.

It would appear that none of the equities favor the defendants in their attempt to accomplish an unconstitutional object, and in taking the property of the people of the Great Lake states, without Congressional authority and without just compensation.

The issues of this case are principally questions of law to be decided by reference to the Federal Constitution and an act of Congress. Complainant contends that Congress is limited by the Constitutional restriction to a dealing with diversions for the protection, preservation and improvement of navigation; that this limitation restricts Congress and *a fortiori* the Secretary of War from authorizing obstructions in navigable waters for the purposes of sewage disposal and water power development. But even assuming Congress has power to deal with diversion of these waters, we contend it has not exercised that power by any affirmative act. Section 10 of the Act of March 3, 1899, instead of giving affirmative authorization, is a positive prohibition of power to authorize any obstructions to navigable capacity without an affirmative act of Congress. Instead of a grant of power to the Secretary of War

to authorize obstructions, it constitutes an express limitation upon his right to act. The constitutional authority of both Congress and the Secretary of War is subject to the limitation of the 5th amendment prohibiting the taking of complainant's property and that of her people, without due process and just compensation. Any invasion of that right by Congress or the Secretary of War is an invasion of the property right guaranteed to complainant and her people by the Constitution.

Defendants claim the right to abstract these waters under a permit from the Secretary of War which depends entirely for its validity upon the power of that officer to authorize the creation of an obstruction to navigation in the Great Lakes. Certainly no act of Congress can be pointed to expressly giving this power to the Secretary of War, but it is claimed that section 10 of the Act of March 3, 1899, *intends* the delegation of such a power. It is admitted that this is the only act that can even be claimed to have that effect. *But section 10 expresses a prohibition against the creation of any obstruction to navigable capacity as strongly as language can be used to accomplish that object.* Congress could not express any more plainly and unmistakably its desire to assert and retain exclusive control over obstructions to navigable capacity than to say that:

> "The creation of *any* obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited."

If language means anything at all in following the legislative direction, this statute expresses as plain a prohibition as a legislative body could express. It did not deal with weasel words such as "disapprove." Its expression was couched in no uncertain terms when it said *"is hereby prohibited." This section was an express prohibition to every State and municipal government, public and private corporation, individual and officer, everywhere and under every circumstance. Con-*

gress intended that it alone should deal with abstructions to navigation before they were to be authorized.

Defendants have argued that the second and third clauses qualify the meaning of the first clause so as to give to the Secretary of War this power to authorize obstructions, but the second and third clauses contain additional express prohibitions and not a single affirmative authorization. In fact the whole section deals with express prohibitions,—three in number. *To say that three express prohibitions furnish an express or implied grant of power would be to adopt a rule of construction which has never before been laid down by this Court.* It would amount to holding that Congress meant an affirmative when it used three negatives, and *that where Congress said that all obstructions were prohibited it meant that all obstructions were not prohibited, but that some were prohibited and some were authorized.*

To derive a grant of power of this vast nature, which affects the lives and property of millions of people, influences the future prosperity of great commonwealths, and opens up a controversy involving international relationships with a foreign government, there should at least be a clear foundation in the language of Congress. But here, without other than three express prohibitions, it is attempted to derive a power which is "as broad as the power of Congress itself." Is this Court ready to use this sort of construction for a statute which is a limitation and restriction upon obstructions to navigation and does not contemplate any grant of power except by the affirmative authorization of Congress? If this statute were construed to derive a power by grant from Congress to the Secretary of War, it would constitute the greatest power which the War Department has received with relation to peacetime projects, and would transfer from Congress to the Secretary of War legislative powers over all navigable waters.

Defendants seek to save the city of Chicago from expenditure for sewage disposal. Abatement of this abstraction would compel Chicago to take care of its own sewage at its own expense. But this would have the disadvantage of being expensive and the water power income would also cease, so Chicago is determined to go ahead and continue its wilful and unconscionable diversion of the waters of the Great Lakes-St. Lawrence Waterway System, for its own selfish and limited purposes. All hope that Chicago will voluntarily treat its sewage, forego its water-power profits and stop this enormous abstraction have long since vanished. Complainant and other lake states have been forced to act, just as the Federal Government was forced to preserve what had not already been taken by Chicago. Defendants have not dealt fairly. Their conduct has been inequitable and unconstitutional. We respectfully ask that this Court enjoin defendants from diverting and abstracting these waters in accordance with the prayer of the Bill of Complainant.

Respectfully submitted,

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